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No. — 15

In the Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INSURANCE AGENTS INTERNATIONAL UNION, AFL-CIO

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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No. —

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v.

INSURANCE AGENTS INTERNATIONAL UNION, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, issued October 23, 1958, denying enforcement of an order issued by the Board against Insurance Agents International Union.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, p. 19) is not yet reported. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 33-44)¹ are reported at 119 NLRB, No. 103.

¹The record here consists of the joint appendix filed in the court below.

JURISDICTION

The court below entered its judgment on October 23, 1958 (Appendix A, *infra*, p. 20). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

During the course of collective bargaining negotiations the union, which was the collective bargaining representative of the employees, instigated a series of harassing tactics, including refusals to write new business, refusals to work scheduled hours, refusals to make reports in the manner provided by the employer, and refusals to participate in Company conferences and promotion plans. By these tactics, the union sought to compel the employer to accede to its bargaining demands. The question presented is whether, as a matter of law, the Board erred in finding that, in using such tactics as a means of bringing pressure upon the employer to yield to its demands in the pending negotiations, the union violated its statutory obligation to bargain collectively in good faith.

STATUTE INVOLVED

Section 8 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), provides in pertinent part:

UNFAIR LABOR PRACTICES

SEC. 8. * * * (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of

his employees subject to the provisions of section 9 (a):

(d) For the purposes of this section, to bargain collectively in the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *

STATEMENT

I. The Board's findings of fact

Briefly, the Board found that during the course of bargaining negotiations with the Prudential Insurance Company of America, herein referred to as the "Company," the Union engaged in "harassing tactics * * * for the avowed purpose of compelling the Company to capitulate to its terms" (R. 37). The Board concluded that the Union's conduct did not constitute bargaining in good faith, and that the Union therefore violated Section 8 (b) (3) of the Act (R. 39). The Board based its conclusion upon the following subsidiary facts:

The Union has represented the Company's district agents for a number of years (R. 34). On January 16, 1956, about two months before the expiration date

of the contract then in effect, the Union and the Company began negotiations for a new contract (R. 34). On March 13, the Union notified its members that unless agreement on contract terms were reached by March 19, a "work without a contract" program would be put into effect (R. 34-35; 56).

The parties failed to reach agreement by the given date, and the bargaining negotiations continued. Although still participating in the bargaining sessions, the Union then began its "work without a contract" program by instructing its members for the week beginning March 19 not to write new business and to picket, demonstrate, and distribute leaflets before the Company's offices on Wednesday and Friday of that week (R. 35; 56-57). As indicated by these initial instructions, the Union's "work without a contract" program was designed to put pressure on the Company to accept the Union's bargaining demands by requiring the district agents to engage in "slow downs" and other harassing tactics during the course of contract negotiations. The program was thereafter continued in effect by means of weekly directives to the officers and members of the Union's locals. The harassing tactics which the district agents engaged in at the Union's orders may be summarized as follows:

1. From March 19 to May 7, the district agents refrained from writing new insurance. When they resumed the writing of new business, the district agents, in disregard of Company instructions, bypassed staff managers in reporting such business (R. 35-36; 56, 101).

2. The Company's working rules require district agents to report to their district offices every Tuesday and Friday at 8:30 a. m. for meetings, instructions, and financial accounting. The Union instructed its members to "sit-in" on Tuesday morning, March 27, adding that "All the agents will report to the office but not before 10 a. m. and remain in the district or detached office until 12 noon, doing what comes naturally. At 12 noon all Agents will depart in a group" (R. 35; 62). Similar instructions to report late and to "sit-in" until noon on Tuesdays and Fridays were included in subsequent directives (R. 35; 67, 94).

3. Agents are expected to attend business conferences which the Company schedules regularly as part of its training and sales program. On April 12, and in subsequent directives, the Union notified its members, in an "all-go-or-no-go" program, not to attend such business conferences (R. 35; 80-81).

4. The Company sponsored a special sales campaign from May 21 to June 22, termed "May Policyholders' Month." At the Union's direction, the district agents ignored the campaign, refusing to attend special meetings, to accept campaign material supplied by the Company, or to work evenings (R. 36; 94).

5. From March 19 to June 21, the Union directed its members to picket the Company's offices during certain of their normal working hours and, beginning with the week of April 9, the Union further instructed its members to secure policyholders' signatures on petitions urging the Company to negotiate a contract

with the Union "which will provide fair and favorable working conditions" (R. 62, 72-73, 77-78). On April 27, pursuant to Union orders, the district agents participated in mass demonstrations before the Company's home offices while signed policyholders' petitions were being presented to the Company (R. 35; 91).

In its directives to its local officers and members, the Union strongly emphasized the importance of carrying out the "work without a contract" program, if the Union was to prevail in its bargaining demands. Thus, on April 16, the Union declared in a directive to its local officers: "Remember, the successful conclusion to a fair and equitable contract depends on the extent to which the members of the Union participate in the activities outlined for them. The contract will be won in the field—not at the negotiating table" (R. 85). On June 4, 1956, the Union reiterated its position that "the contract will be won in the field and not at the negotiating table" (R. 98). Not content merely with exhorting its members to carry out the "work without a contract" program, the Union disciplined members who failed to participate in the program (R. 54, 100, 103).

The Union encouraged its members to participate in the "work without a contract" program by describing the impact of this campaign of harassing tactics on the Company. In its directive of March 28, the Union informed its members that the program "is having a decided effect upon management and its success has been the subject of discussions at the bargaining table" (R. 37, n. 8; 63). Similarly, on

April 12, the Union declared, "you know that the Company is unhappy because our membership are able to draw their salaries while continuing the program" (R. 39, n. 14; 82-83).

The Union further demonstrated its reliance on its program of harassing tactics at bargaining sessions with the Company. Thus, on Friday, March 23, a few days after the start of the "work-without-a-contract" program, Union negotiator Ed Smaier declared (R. 129):

In the last analysis, we have merely added more negotiators. The contract has expired. Under the law of the land we are permitted to carry out certain concerted activities in order to bring the employer to a more receptive attitude toward our legal demands. We just have more negotiators, and this is a labor union.

The "work without a contract" program ended on June 21, when the Union advised the agents that sufficient progress had been made in negotiations to warrant its discontinuance "until further notice" (R. 35; 98-99). The parties executed a new contract on July 17, 1956 (R. 35, n. 3).

II. The Board's conclusions and order

The Board found that the Union, while purporting to negotiate its differences with the Company, engaged in a series of harassing tactics "designed to force the Company to yield to its bargaining demands" (R. 35). The Board regarded such tactics as not reflecting the good faith requirement of the Act, holding that they were irreconcilable with the duty imposed by the Act upon both employers and unions to engage in bargain-

ing with an "open and fair mind" and with a willingness to let ultimate decision follow a fair opportunity for the presentation of pertinent facts and arguments" (R. 36). Viewing the Union's conduct as not sanctioned by the Act, and therefore materially different from a legitimate strike, the Board held that such conduct during bargaining negotiations warranted an inference of bad faith (R. 37-38). Accordingly, the Board concluded that the Union, by engaging in harassing conduct during the course of bargaining with the Company, violated its statutory duty to bargain in good faith, as required by Section 8 (b) (3) of the Act (R. 39). In so holding the Board relied on its decision in *Textile Workers Union*, 108 NLRB 743, set aside, 227 F. 2d 409 (C. A. D. C.), certiorari granted, 350 U. S. 1004, order granting certiorari vacated and certiorari denied, 352 U. S. 864 (R. 38, n. 11; 39).

The Board's order (R. 42-44) requires the Union, so long as it remains the representative of the Company's employees, to cease and desist from refusing to bargain collectively in good faith with the Company by engaging in harassing tactics in order to force the Company to accept its bargaining demands. The order further requires the Union to post appropriate notices.

III. The holding of the court below

The court below set aside the Board's order, noting that the case was indistinguishable from *Textile Workers*, *supra*, in which the court below, by divided vote, had set aside a similar order. In the instant case the court did not reexamine the issue, but stated

that "One panel of this court will not attempt to overrule a recent precedent set by another panel, even though one or more of its members may disagree with the ruling" (*infra*, p. 19).

In the *Textile Workers* case (*infra*, pp. 21-24), the court below, stating that "there is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants," concluded that "the Board's theory that such [harassing] tactics are evidence that a union is not bargaining in good faith * * * will not stand analysis" (*infra*, p. 23). The court stated that the union might have called a strike; that "no inference of failure to bargain in good faith could have been drawn from a total withholding of services, during negotiations, in order to put economic pressure on the employer to yield to the Union's demands"; that it was "equally clear that no such inference can be drawn from a partial withholding of services at that time and for that purpose"; and that except for such specified conduct as jurisdictional strikes and secondary boycotts, the Act does not limit "the use of economic pressure in support of lawful demands" (*infra*, p. 23). Citing this Court's decision in *Automobile Workers v. Wisconsin Board*, 336 U. S. 245, the court further held that the conduct in question is "not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner" (*infra*, p. 24). Accordingly, the court set aside the Board's order insofar as it rested upon the finding of a failure by the Union to bargain in good faith.

Judge Danaher, dissenting, was of the view (*infra*, pp. 24-33) that the Board, on the "totality of the record," could properly conclude that the Union was not bargaining in good faith, and noted further that the harassing tactics considered by themselves constituted attempts "unilaterally to change working conditions during the bargaining process," in violation of the statutory duty to bargain collectively.

REASONS FOR GRANTING THE WRIT

The question presented in this case is identical to that on which this Court granted certiorari in *Textile Workers, supra*. The considerations which led to the grant of the writ in that case apply equally to the instant case.²

1. The decision below permits a union to maintain that it is bargaining in good faith, while contemporaneously with the negotiations, and for the purpose of compelling the employer to submit to its demands, it causes the employees, in the course of their employment, to engage in slowdowns, intermittent refusals to work, and other actions calculated seriously to injure the employer's business. There is no question, as the court below recognized, but that such activity is outside the protection of the Act and that

² The Board's order in the *Textile Workers* case, as here (R. 42), was conditioned on the union's remaining the bargaining representative of the employees. After the grant of certiorari in that case the Board certified another union as the bargaining representative of the employees there involved. We filed a memorandum apprising the Court of this circumstance, but stating that in our opinion the case had not become moot (No. 35, October Term, 1956). This Court thereupon vacated the grant of, and denied, certiorari, 352 U. S. 864.

the employer could lawfully discharge employees for engaging in it.³ In effect, therefore, the decision below permits a union to compel an employer either to discharge the employees and perhaps close down his business or to bargain with it while the employees, at the direction of the union, continue in their employment, collect wages for it, and at the same time "select what part of their allotted tasks they [care] to perform of their own volition, or refuse, openly or secretly, to the employer's damage, to do other work" (*Hoover Co. v. National Labor Relations Board*, 191 F. 2d 380, 389 (C. A. 6), quoting *National Labor Relations Board v. Montgomery Ward & Co.*, 157 F. 2d 486, 496 (C. A. 8)). The issue here is whether the union which directs such activity for the purpose of compelling acceptance of its bargaining demands can properly be said to be discharging its statutory obligation to bargain collectively in good faith.

2. The court below concluded that resort to such a "partial" strike is no more incompatible with the statutory obligation to bargain in good faith than resort to a total strike. In the Board's view, however, there is a substantial and significant difference between these two forms of economic pressure in so

³ *C. G. Conn. Ltd. v. National Labor Relations Board*, 108 F. 2d 390, 398 (C. A. 7); *Home Beneficial Life Ins. Co. v. National Labor Relations Board*, 159 F. 2d 280, 284 (C. A. 4); certiorari denied, 332 U. S. 758; *National Labor Relations Board v. Mac Smith Garment Co.*, 219 F. 2d 469, 470-471 (C. A. 5); *Hoover Co. v. National Labor Relations Board*, 191 F. 2d 380, 389 (C. A. 6). See also, *National Labor Relations Board v. Local 12-9, International Brotherhood of Electric Workers*, 316 U. S. 461; *Autocar Tire Workers v. W. F. R. Co.*, 336 U. S. 215.

far as they bear upon the duty to bargain collectively in good faith.

To begin with, a lawful strike enjoys statutory protection. The right to strike is expressly recognized by the Act, and as a time-honored traditional weapon in the labor movement enjoys a particular and peculiar status under the law. As Senator Taft observed in a statement thrice quoted by this Court as an authoritative gloss on the Act, the right to strike has been preserved as an essential element of free collective bargaining.⁹ On the other hand, the partial strike tactics, which were utilized here, are not a traditional weapon in the labor movement, they are not protected by the statute, and their availability is not essential to free collective bargaining. Indeed, such tactics have been described as the "diseases of collective bargaining, not of its nature".

Moreover, unlike the cessation of both work and pay involved in a strike, resort to harassing tactics like those in this case is designed to enable the employees, during the bargaining negotiations, unilaterally to dictate the terms of their employment and to accept compensation from their employer without giving him a regular return of work done. The

⁹ 93 Cong. Rec. 3835, quoted in *Amalgamated Assn. etc. v. W. F. R. B.*, 340 U. S. 383, 395, n. 21; *U. A. W. v. O'Brien*, 339 U. S. 454, 457, n. 3; *National Labor Relations Board v. International Rice Milling Co.*, 341 U. S. 665, 673, n. 8.

¹⁰ S. Rep. under S. Res. 71, 82nd Cong., 1st Sess., pp. 5, 9 (*Factors in Successful Collective Bargaining*), a report prepared by the Library of Congress for the Senate Subcommittee on Labor and Management Relations.

¹¹ The employees' partial loss of commissions is hardly to be compared with the total loss in pay involved in a strike.

employer is faced with the choice of either discharging the employees and losing new business to competitors, or operating under these very serious handicaps or succumbing to the union's demands.

Where a strike is called there are economic pressures on both the employer and the union to adjust and compose their differences in a spirit of give and take. However, where the union does not go out on strike but resorts to the tactics utilized here, it is in the felicitous position of "having its cake and eating it too." The economic pressure is largely one-sided, with little compulsion upon the union to reach an accord other than upon its own terms. Here, as in *Automobile Workers v. Wisconsin Board*, 336 U. S. 245, 249, 250, "these tactics were intended to and did * * * put strong economic pressure on the employer * * *. And it was said that 'this can't be said for the strike. After the initial surprise of the walk-out, the company knows what it has to do and plans accordingly.' It was commended as a procedure which would avoid hardships that a strike imposes on employees and was considered 'a better weapon than a strike.'" Thus, the instant case calls into play the very considerations which prompted this Court to conclude that intermittent work stoppages could not, as a form of economic pressure, be equated

¹ Cf. *National Labor Relations Board v. Local 1229, International Brotherhood of Electrical Workers*, 346 U. S. 463, 476: "Nothing could be further from the purpose of the Act than to require an employer to finance such activities. Nothing would contribute less to the Act's declared purpose of promoting industrial peace and stability." Cf. *Automobile Workers v. Wisconsin Board*, 336 U. S. 245.

with strike action. Whenever resort is had to such production-disrupting tactics to compel acceptance of bargaining demands, the area of genuine collective bargaining has been substantially preempted.

Collective bargaining in good faith presupposes "cooperation in the give and take of personal conferences with a willingness to let ultimate decision follow a fair opportunity for the presentation of pertinent facts and arguments." *National Labor Relations Board v. Jacobs Mfg. Co.*, 196 F. 2d 680, 683 (C. A. 2). The harassing tactics utilized by the Union in the instant case manifestly preclude such an opportunity and necessarily tend to reduce negotiations to a "sterile discussion" (*National Labor Relations Board v. American National Insurance Co.*, 343 U. S. 395, 402-403). Accordingly, as the Board stated in *Textile Workers*, 408 NLRB at 746-747, such tactics are "irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good faith bargaining must rest" and impair "the process of collective bargaining that Congress intended not only to encourage but to protect."

It has long been recognized that an employer's unilateral action with respect to matters subject to bargaining, by-passing the collective bargaining process, is "manifestly inconsistent with the principle of collective bargaining." *National Labor Relations Board v. Crompton-Highland Mills*, 337 U. S. 217, 225. By a parity of reasoning, the harassing tactics in this case, which also constituted unilateral alteration of terms and conditions of employment by

the Union, were properly held by the Board to be inconsistent with that principle."

3. The decision below sanctions the use of a potent economic weapon in connection with collective bargaining which, if the decision stands, undoubtedly will play an increasingly significant role in collective bargaining relationships, and accordingly in the administration of the Act." Unless reversed, the decision

*This Court's decision in *Automobile Workers v. Wisconsin Board*, 336 U. S. 245, cited by the court below in support of its views, was concerned with the state's power to deal with such tactics, as against the claim that such activity falls within the area preempted by the federal Act. See the later reference to that decision in *UAW v. W. E. R. B.*, 351 U. S. 266, 274, n. 12. We do not read the decision, which affirmed the state's power in this respect, as precluding the Board, in the exercise of its undoubted power to remedy refusals to bargain in good faith, from examining such tactics to determine whether the statutory obligation has been satisfied.

*Indicative of the widespread use of such tactics, although not always in a context of collective bargaining, are the following decisions in which the Board in recent years has dealt with issues raised by resort to those tactics: *California Cotton Cooperative*, 110 NLRB 1494, 1495-1496 (slowdown); *Valley City Furniture*, 110 NLRB 1589 (refusal to work overtime); *Honolulu Rapid Transit*, 110 NLRB 1806 (weekend strikes); *Southern Fruit Distributors*, 109 NLRB 376 (work stoppages during settlement of grievances); *Kohler Co.*, 108 NLRB 207, 213 (intermittent work stoppages—leaving work before completing shift); *Montgomery Ward*, 108 NLRB 1175 (failure to perform part of duties while picketing was in progress); *Pacific Telephone & Telegraph*, 107 NLRB 1547 (intermittent and unannounced work stoppages); *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (unannounced work stoppage); *Phelps Dodge Copper Products Corp.*, 101 NLRB 360 (slowdown); *Gimbel Bros.*, 100 NLRB 870, 888-890 (work stoppages during on-the-job harassment of nonunion employees); *International Shoe Co.*, 93 NLRB 907 (intermittent walkouts); *Elk Lumber Co.*, 91 NLRB 333 (slowdown).

can only serve to encourage resort to tactics like those employed by respondent in this case.¹⁰ It is important, therefore, that both employers and unions have an authoritative adjudication by this Court of their rights and duties with respect to the use of such tactics as a bargaining device.

4. Although there is no conflict among the courts of appeals on this question, the court below is manifestly sharply divided, as is evidenced by the dissent in the *Textile Workers* case and the indication in the instant case that "one or more" of the members of the panel may disagree with the prior decision (*infra*, p. 19). There is no reasonable likelihood that any other court of appeals will have an opportunity to pass upon this question, since unions faced with similar Board orders will presumably follow the pattern set in this case, and bring review proceedings in the District of Columbia Circuit.

¹⁰ Respondent frankly stated in its reply brief in the court below (p. 4) that it "relied on [the *Textile Workers* decision] in concluding that these activities were legal and proper under the Act."

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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DECEMBER 1958.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

No. 14,262

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AND ON CROSS-
PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Decided October 23, 1958

Before PRETTYMAN, WILBUR K. MILLER and WASH-
INGTON, Circuit Judges.

PER CURIAM: This case involves the same question of law as was presented in *Textile Workers Union v. National Labor Relations Board*, 97 U. S. App. D. C. 35, 227 F. 2d 409 (1955), cert. granted, 350 U. S. 1004, cert. vacated, 352 U. S. 864 (1956). Amicus attempts to distinguish this case from *Textile Workers Union*, but we find no critical difference between the two cases. On the authority of that case, the order of the Board here under review must be set aside. One panel of this court will not attempt to overrule a recent precedent set by another panel, even though one or more of its members may disagree with the ruling.

So ordered.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 14,262

September Term, 1958

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review and Set Aside and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

Before: PRETTYMAN, WILBUR K. MILLER and WASHINGTON, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the National Labor Relations Board and on a petition to review and set aside and a cross-petition for enforcement of the order of the National Labor Relations Board herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the National Labor Relations Board in this case be, and it is hereby, set aside, and that this case be, and it is hereby, remanded to the said National Labor Relations Board for further proceedings not inconsistent with the opinion of this court.

Per Curiam.

Dated: Oct. 23, 1958.

Filed Oct. 23, 1958.

JOSEPH D. STEWART,
Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12248

TEXTILE WORKERS UNION OF AMERICA, CIO, AND
ITS AGENTS, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND ON CROSS-PETITION FOR
ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

Decided October 27, 1955

Before EDGERTON, BAZELON, and DANAHER, Circuit
Judges.

EDGERTON, *Circuit Judge*: This case is here on the Union's petition for review, and the Board's petition for enforcement, of a Board order.

One of the 1947 amendments of the National Labor Relations Act, § 8 (b) (3), 61 Stat. 141, 29 U. S. C. § 158 (b) (3), extends to unions the duty to bargain collectively. Section 8 (d) defines bargaining collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith * * * but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *." 29 U. S. C. § 158 (d).

Shortly before a collective bargaining contract between the company and the Union expired on October 15, 1952, they began negotiations for a new contract. At the end of the year no agreement had been reached. The Union did not break off negotiations. The Board raised no question about the Union's having met and conferred with the company and participated in the argument and persuasion inherent in the bargaining process. The Board made no finding that the Union tried to "frustrate the duty to bargain collectively, by delivering an ultimatum on a 'take it or leave it' basis". (Cf. 93 Cong. Rec. 4135. But the Trial Examiner and the Board found that the Union "decided 'to force the employer's hand in the then current negotiations,' not by a strike 'in the commonly understood sense of the word,' but by a series of unprotected harassing tactics: an organized refusal to work overtime, an unauthorized extension of rest periods from 10 to 15 minutes, the direction of employees to refuse to work special hours, slowdowns, unauthorized walkouts, and inducing employees of a subcontractor not to work for the employer." The Board found that these tactics were "evidence that the [Union] failed to bargain collectively in good faith". The Board ordered the Union to: "Cease and desist from: (a) Refusing to bargain collectively in good faith with the Company, by engaging in slowdowns and unauthorized extensions of rest periods; by engaging in walkouts or partial strikes for portions of shifts or entire shifts; by inducing employees of other concerns not to perform work for the Company; by refusing to work special hours or overtime; or by engaging in any similar or related conduct in derogation of the statutory duty to bargain * * *." We have to decide whether the order is valid.

Courts have held that similar union tactics are "unprotected", in the sense that employers may lawfully discharge employees for using them. But until now no court, as far as we know, has been called upon to consider the Board's theory that such tactics are evidence that a union is not bargaining in good faith and may therefore be forbidden. The theory will not stand analysis. There is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants. As the Board intimated, the Union might have called a strike; no inference of failure to bargain in good faith could have been drawn from a total withholding of services, during negotiations, in order to put economic pressure on the employer to yield to the Union's demands. As a simple matter of fact, it is equally clear that no such inference can be drawn from a partial withholding of services at that time and for that purpose. There is no legal basis for ignoring this fact. Though the National Labor Relations Act encourages negotiation and seeks to reduce industrial strife, it does not forbid industrial strife. Aside from some specified conduct, such as jurisdictional strikes and secondary boycotts, we do not find that Congress limited the use of economic pressure in support of lawful demands.

International Union, UAW v. Wisconsin Employment Relations Board, 336 U. S. 245, like this case, involved "intermittent and unannounced work stoppages". There, as here, the "employer was not informed * * * of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them." The Union's tactics were "described by the Union leaders as a new technique for bringing pressure upon the employer."

336 U. S. at 248, 249. In sustaining State legislation directed against such tactics, the Supreme Court said: "Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied. * * * [T]he conduct here described is not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner." 336 U. S. at 253.

We have discussed the part of the Board's order that is in issue. Other parts, not in issue because the Union does not contest them, direct the Union to cease and desist from "threatening" employees with "reprisals" for working overtime and for giving testimony in the proceeding before the Board; from blocking plant entrances so as to prevent ingress and egress of employees; and from in any other manner restraining or coercing employees in the exercise of their rights under the Act. This part of the order is not based on the collective bargaining requirements of the Act but on § 8 (b) (1) (A), which makes restraint and coercion of employees by a union an unfair labor practice. The Board did not find, and does not suggest, that misconduct in general or abuse of employees in particular is evidence of a refusal to bargain in good faith with an employer.

So much of the Board's order as rests upon supposed refusal to bargain in good faith will be set aside. So much as rests upon restraint and coercion of employees will be enforced.

*Enforced in part,
set aside in part.*

DANAHER, *Circuit Judge*, dissenting: The Hearing Examiner and the Board without dissent found "upon the entire record in the case, and pursuant to § 10 (c).

of the National Labor Relations Act" that the union had refused to bargain collectively in good faith with the company. The Board based its order not only upon the conduct and tactics described in the majority opinion as "unprotected," but upon a series of violations of § 8 (b) (1) (A) involving threats of personal violence, impeding and interfering with employees who had been subpoenaed to testify and blocking of physical ingress to the plant. The Board is specifically empowered by § 10 (a) of the Act to prevent any person from engaging in any unfair labor practice, and § 10 (c) provides that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." The union does not challenge the findings of the Board, it does not disclaim its campaign of "harassing tactics." On the contrary, it has insisted that its tactics comprise merely a proper use of its full economic strength, particularly since none of the specific limitations set forth by Congress are transgressed. It amounts to saying that so long as the union's purpose is not to destroy the employer, the union is free to adopt and put into practice any tactics it may select which have not been specifically interdicted by Congress and assigned to the Board's jurisdiction.

Putting aside the fact that the tactics were only one of the elements in the totality of the record, the majority say that the Board may not, as a matter of law, conclude that the tactics are "evidence" that the union is not bargaining in good faith. It seems to rest its conclusion upon *International Union, UAW, v. Wisconsin Employment Relations Board*, 336 U. S. 245 (1949). The Court there held that federal legislation afforded no basis "for denying to Wisconsin the power, in governing her internal affairs, to reg-

ulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device." The Court did not have before it the question of whether the conduct in that case might constitute evidence of lack of good faith in bargaining. The Board here has not asserted that the "tactics" constitute a violation of federal law. It has said that such conduct taken into account with all other factors "on the entire record" justified a finding of failure to bargain in good faith.

Surely it is within the competence and one of the functions of the Board to inquire into and to decide problems arising from § 8 (d) of the Act. The Labor Management Relations Act of 1947 imposed upon the unions identically the same duties to bargain in good faith which previously under the National Labor Relations Act, had applied only to employers. It is deemed unnecessary to cite the repeated instances to be found in the reported cases where an employer was found by the Board to have failed to bargain in good faith. See 29 U. S. C. A. § 158 n. 265. In my judgment the union's actions were designed unilaterally to change working conditions during the bargaining process, in fact I can attribute no other effect to the series of sudden and unannounced walkouts of entire shifts, deliberate slowdowns and refusals to work overtime and special hours. Certainly, as the majority notes, the union could have called a strike, and thereafter it could have negotiated further with the employer. It could have continued its members at work while negotiations proceeded. It did neither. This was not "a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right

to fix hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." *C. G. Conn, Ltd. v. Labor Board*, 108 F. 2d 390, 397 (7th Cir. 1939). *Labor Board v. Rockaway News Supply Co., Inc.*, 345 U. S. 71 (1953); *Home Beneficial Life Ins. Co. v. Labor Board*, 159 F. 2d 280, 286 (4th Cir. 1947), *cert. denied*, 332 U. S. 758 (1947).

The Supreme Court has repeatedly stated that one of the prime purposes of the National Labor Relations Act, as amended, is the achievement of industrial peace. As lately as last December the Court, in holding an employer guilty of an unfair labor practice, said, "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit." *Brooks v. Labor Board*, 348 U. S. 96, 103 (1954). Here the employer expressly turned to the Board. "[Congress] went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner v. Teamsters Union*, 346 U. S. 485, 490 (1953). "On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board. The respondents

were subject to being summoned before that Board to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State." *Id.* at 501.

In our case, the Board's opinion noted:

"The Respondents engaged in these unprotected concerted activities at a time when they purported to be conferring in good faith with the employer in negotiations. These unprotected tactics interfered with production and put strong economic pressure on the employer who was thereby disabled from making any dependable production plans or delivery commitments.¹ Moreover, the employer was not informed of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them.² We think it clear that such unprotected harassing tactics were an abuse of the union's bargaining powers—irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good faith bargaining must rest—which impaired

¹ This type of disruption is not a concomitant [*sic*] of a strike; there, after the initial surprise of an unannounced walk-out, the company knows what it has to do and plans accordingly. See *Int'l Union, U. I. W. AFL Local 232 v. W. E. R. B.*, 336 U. S. 245, at 249. [This footnote to the Board's opinion impels recourse to the Supreme Court's opinion for a larger understanding of the Board's reference.]

² [Omitted.]

³ The Board so characterized a slowdown during the course of negotiations in *Phelps Dodge Copper Products Corporation*, 101 NLRB 360 at 368. [Again, the Board's footnote is pointed. Collaterally it may be noted that to the extent a strike may be proscribed by the Act, its language also includes, by definition, "any concerted slow-down or other concerted interruption of operations by employees." 29 U. S. C. A. § 142 (Supp. 1954).]

the *process* of collective bargaining that Congress intended not only to encourage but to protect.

"Although the employer could legally have resorted to self-help by discharging employees for such conduct or by retaliating by shutdown, it did not do so. Nor did it refuse to bargain. Instead, it sought a much less drastic remedy by filing the present charge, requesting the Board to investigate and adjudge the Respondents' conduct under the federal act."

Yet if the majority be correct, the employer's remedy will be to discharge the employees who use unprotected tactics and retaliate by a shut-down. Surely, in the interest of elimination of industrial strife and the achievement of industrial peace, the processes of collective bargaining were imported into the federal law and are to be enforced. "The 1947 Act has increased, rather than decreased, the legal responsibilities of labor organizations. Certainly that Act did not expressly relieve labor organizations from liability for unlawful conduct. It sought primarily to empower a federal regulatory body, through administrative procedure, to forestall unfair labor practices by anyone in circumstances affecting interstate commerce." *United Workers v. Laburnum Corp.*, 347 U. S. 656, 666 (1954). Thus Congress imposed upon the union, as previously upon the employer, the duty to bargain in good faith. The Board here concluded unanimously that the union had failed to bargain in good faith. "Respondent's unilateral action in changing working conditions during bargaining, now admitted to be a departure from good faith bargaining, is the subject of an enforcement order issued by the court below and not challenged in this Court." (Emphasis supplied.) *Labor Board v. American Ins.*

Co., 343 U. S. 395, 409 (1952). What applies to the employer applies to the union, in my understanding.

It seems to me that the majority errs in dealing with this case as though, once again, the same judges were confronted with a situation such as was presented in *Local Union No. 1229 v. N. L. R. B.*, 91 U. S. App. D. C. 333, 202 F. 2d 186 (C. D. Cir. 1952), *reversed*, 346 U. S. 464 (1953). We are not called upon to decide whether the tactics here have been withdrawn from the protection of § 7 of the Act, although the majority recognize that "courts have held that similar union tactics are 'unprotected,' " as the Board found.⁴ Nor, in my judgment, is it correct for the majority to say that because a strike could have been called, no bad faith "inference can be drawn from a partial withholding of services in order to put economic pressure on the employer." A lawful strike is one thing, and a "sit down" strike is another. *Labor Board v. Fansteel Corp.*, 306 U. S. 240 (1939). And see *Labor Board v. Electrical Workers*, 346 U. S. 464 (1953), and cases cited in footnote 13, at page 478.

In a lawful strike, the strikers under the Act still retain the status of "employees" and have all the advantages to which they and their organization are entitled under the law. But "An employee can not work and strike at the same time. He can not continue in his employment and openly or secretly refuse to do his work. He can not collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business. It was implied in the contract of hiring that these em-

⁴The union in its brief expressed the belief that this case can "be disposed of without reaching the issue as to whether such activities are unprotected," but contends that the tactics "are protected by § 7 of the Act." But see *Automobile Workers v. O'Brien*, 339 U. S. 454, 459 (1950).

employees would do the work assigned to them in a careful and workmanlike manner; that they would comply with all reasonable orders and conduct themselves so as not to work injury to the employer's business; that they would serve faithfully and be regardful of the interests of the employer during the term of their service, and carefully discharge their duties to the extent reasonably required. * * *

While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work.' *National Labor Relations Board v. Montgomery Ward & Co., Inc.* [157 F. 2d 486, 496 (8th Cir. 1946)]." *Hoover Co. v. N. L. R. B.*, 191 F. 2d 380, 389 (6th Cir. 1951). See 346 U. S. at 475..

I believe that to be a correct statement of the law, and I suspect that the Supreme Court thinks so, too. In *Labor Board v. Electrical Workers*, *supra*, the Court said (346 U. S. at 476): "Nothing could be further from the purpose of the Act than to require an employer to finance such activities: Nothing would contribute less to the Act's declared purpose of promoting industrial peace and stability." (And see footnote 12.)

The majority say that the conduct described in its order may not be considered as "evidence" that the union failed to bargain collectively in good faith, although there is no slightest suggestion that the facts failed to justify the findings, nor could there be in the light of the concession made to us. The majority lay aside the threats of reprisals, the blocking of ingress by cars into the plant by the shop chairman and var-

ious other coercive conduct which "the union does not contest." But the Board was charged with the duty of ascertaining "good faith" on the whole record. The various types of conduct disclosed made up that record. "Not only are the findings of the Board conclusive with respect to questions of fact in this field when supported by substantial evidence on the record as a whole, but the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight. In the views of the Board as applied to this case we find conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *Labor Board v. Denver Bldg. Council*, 341 U. S. 675, 691, 692 (1951). Granted the Court was there dealing with a § 8 (b) (4) (A) case, the principle seems to me controlling here. We are not even confronted by a conflict in the evidence, for the union conceded it had ordered the use of the tactics to enforce its demands, nor is an issue raised with respect to the other coercive conduct. Our role in such situations has "special applicability to cases where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." *Labor Board v. American Ins. Co.*, *supra*, at 410. "We think the Board had full authority to determine as a fact whether petitioner was acting in good faith or whether its actions amounted to a mere superficial pretense at bargaining—whether it had actually the intent to bargain, sincerely and earnestly—whether the negotiations were captious and accompanied by an active purpose and intent to defeat or obstruct real bargaining.

[Citing cases.]” *Singer Mfg. v. N. L. R. B.*, 119 F. 2d 131, 134 (7th Cir. 1941), *cert denied*, 313 U. S. 595 (1941), *rehearing denied*, 314 U. S. 708, (1941).

I would deny the petition to set aside the Board's order and would grant the Board's petition for enforcement.

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JAMES R. BROWNING, Clerk

No. [REDACTED] 15

In the Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INSURANCE AGENTS' INTERNATIONAL UNION,
AFL-CIO

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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U. S. Dep't of Labor, Bureau of Labor Statistics,
*Directory of National and International Labor
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8

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 557

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

INSURANCE AGENTS' INTERNATIONAL UNION,
AFL-CIO

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Preliminary Statement

The petition filed in this case was not written about this case. It is virtually a word-for-word copy of the petition filed in the *Textile Workers* case.¹ The petition be-

¹ *National Labor Relations Board v. Textile Workers Union of America, Inc., et al.*, No. 690, October Term, 1955. Certiorari was granted, 350 U.S. 1094, and the case remanded No. 362, October Term, 1956. After the Board had filed its brief on the merits, and both parties had submitted

fore the Court reflects no current appraisal of the old reasons for seeking review by this Court. It reveals no concern with the many decisive differences between the two cases. It consistently relies on statements and implications which evidently were appropriate to the former case but are utterly unsupported on this record.

In effect, Petitioner has treated this case as *Fourth Workers* No. 2. Although the petition does not discuss the distinguishing and unique features of this particular case, the only issue arising on this petition is whether there is any reason for the Court to review *this* case. Accordingly, this Brief unlike the Petition, will discuss this case.

Question Presented

The precise question posed in this record is as follows:

A Union participated in reasonableness and apparent good faith in collective bargaining sessions. It advised the employer in advance of a series of less-than-complete strike activities, including free speech activities. The employer knew what demands the activities were designed to enforce and what concessions could be made to terminate them. The employees involved are insurance Agents, so that manufacturing concepts like "production schedules" or "normal working hours" are without meaning. The economic forces in the insurance industry are such that a

memorandum respecting the question of mootness, both urging the Court to regain jurisdiction, the Court vacated its earlier order, and denied certiorari, 352 U.S. 864. The decision of the Court of Appeals for the District of Columbia Circuit was reported at 97 U.S. App. D.C. 35, 127 F.2d 999, and appears as Appendix B to the Petition thereinafter cited as "Pet." in this case. Pet., 21. The Board decision is reported at 105 NLRB 743.

Hereinafter, references to documents filed in the course of the *Fourth Workers* litigation will be designated by the prefix, "T.W."

The Joint Appendix in the Court of Appeals in the instant case will be cited, "J.A."

complete strike of insurance Agents cannot have the same potential pressure against an employer as a typical strike in industry generally. These Agents are paid exclusively on a commission basis (except for \$7.00 weekly) and thus receive no compensation except for services actually performed. The Board General Counsel introduced no evidence as to the actual impact of the Union activities on the employer or on the bargaining; or as to the relative bargaining positions of the parties; or as to the relative fairness or unfairness of any of the Union activities, under the particular circumstances.

Did the Court of Appeals correctly set aside a Board decision which disregarded *each and all* of the foregoing facts, and found the Union guilty of bargaining in bad faith *solely* because activities the Board regarded as "harassing" had occurred during negotiations, *per se*?

Statutory Provisions Involved

In addition to the provisions cited by Petitioner, the following provisions of the Labor Management Relations Act, 1947 (which includes amendments to the National Labor Relations Act), 61 Stat. 136, 29 U.S.C. 141 *et seq.*, are pertinent to this case:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Sec. 8(c). The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written,

printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Sec. 10(e). * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

Sec. 13. Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications of that right.

Section 501, 61 Stat. 161:

When used in this chapter—

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

Statement

Inasmuch as the Statement contained in the petition, requires supplementation on many different aspects of this case, it seems more orderly to present the facts as they relate to the particular points to be made below.

Reasons for Denying the Petition

1. This case has no general importance. The cold test of experience has proved false Petitioner's unsupported prediction, originally presented to the Court in the *Textile Workers* petition and unblushingly copied in this, that these tactics "undoubtedly will play an increasingly significant role in collective bargaining relationships."² The obvious truth is that this is the lone case involving less-than-full strike activities which has arisen since *Textile Workers*; so that only two such cases have arisen in all, in any context, in the almost dozen years of experience under the Taft-Hartley Act.

An issue arising so rarely surely falls far short of the stature of general importance which a case should attain to merit the consideration of this Court.

2. There is no conflict among the Circuits. This is obvious. It is admitted. Indeed, Petitioner cites it as a ground for a grant, and further, actually argues that this Court should review the case because there is no likelihood of a conflict ever arising!³

² Pet. and T.W. Pet., 15. The cases Petitioner lists in its footnote admittedly arise in a different context. In any event, both petitions cite the identical cases, there are no additional cases cited in this petition. There have been no cases since 1954.

³ Pet., 16. This Court would be overwhelmed if it regarded any disagreement within the Court of Appeals for the District of Columbia Circuit, or any other Circuit Court for that matter, as a reason for granting review. The Court below was not too sharply divided in denying the Board's motion for a hearing *en banc*, based on the alleged importance of the case. Six Judges so voted; Judge Danaher noted he would have granted the motion; Judges Washington and Burger did not participate. C.A.D.C., Appeal No. 14,262, Order of April 2, 1958.

The Company asks "that this Court should find a just result on the particular facts of this case." Motion and Brief of *Amicus Curiae* (hereinafter cited as "Co. Br."), 23. As it would seem obvious that the Court would not grant the writ merely to insure that this particular case is decided correctly, there is no effort herein to catalogue the misstatements which are obvious in any event, in the Company's discussion of this case. For all practical purposes, the *Amicus* Brief is largely repetitious of the petition and thus does not merit separate discussion or answer.

Petitioner is frankly not seeking to clarify but to change the decision in this case. As there is no doubt about the rule of law announced and adhered to by the Court below, there is no such reason for review by this Court as might attend a decision conflicting with that of another Circuit.

3. The Union activities in this case, unlike *Textile Workers*, included free speech activities clearly permitted by the Act. Specifically, the Board included in its summary of what these agents did that they "picketed, demonstrated, and distributed leaflets in front of the home, district and detached offices on specified days; distributed leaflets each day to policyholders and others on the agent's debit; secured policyholders' signatures on petitions directed to the Company on the Respondent's behalf." J.A., 35. These free speech activities have two consequences pertinent to the petition.

First, these activities would clearly appear to be "protected" under Section 7, quoted *supra*, p. 3. Accordingly, this case does not in fact present the issue which the Board apparently urges this Court to consider, namely, whether Union activities it regards as entirely "unprotected" can support an inference of bad faith bargaining. The Board evidently did not separately analyze any of the Union activities but seems to have assumed that all of the activities could be treated as "unprotected" if any could be.

Second, apart from the issue of whether they are "protected" under Section 7, speech activities "shall not constitute or be evidence of any unfair labor practice under any of the provisions of this subchapter," under Section 8(c), quoted *supra*, pp. 3-4.⁴ Respondent's Brief to the

⁴ The expressions of the Union obviously contained "no threat of reprisal or force or promise of benefit", the only statutory limitations.

A typical picket legend, for example, was "Prudential Insurance Company of America refuses a satisfactory contract to its agents." General Counsel's Exh. 40A, Hearing Before NLRB Trial Examiner. A typical

Board expressly relied on this Section, but the Board did not mention the issue in its decision. The Board appears clearly in error in branding the expressions of opinion as unfair practices and enjoining the Union from picketing, circulating petitions and distributing leaflets, during contract negotiations.

Furthermore, the Board considered all the activities as an integrated entity, under the single, all-embracing phrase, "harassing tactics," according none of them independent analysis or foundation. J.A., 36-39. Accordingly, a legal defect as to any of the activities infects and destroys the legal basis as to all. The Board's failure to conform to Section 8 (c) required that the Board order be set aside in its entirety.

4. This case is unique. As the collective bargaining here involved insurance Agents, the economic forces and employment conditions which must be considered are utterly unlike those in industrial relations generally.

leaflet read as follows: "The Prudential Insurance Company Has Refused Us A Fair Contract. They are attempting to destroy our Union and Worsen our working conditions. 'Prudential' advertises security for ALL but denies SECURITY to its AGENTS." General Counsel's Exh. 42.

The petitions read as follows:

"To: Carrol M. Shanks, President,
Prudential Insurance Company,
Newark 1, New Jersey.

"As a policyholder in the Prudential Insurance Company of America, which is a mutual company, I want you to negotiate a contract with the Insurance Agents' International Union, AFL-CIO, which will provide fair and favorable working conditions; which will guarantee my Agent's job security and maintenance of his established clientele. As the Executive Officer of my company, I petition you not to create a situation which will deprive me of my Agent's friendly service and wise counsel.

(Policyholder)

(Pokey Number)

General Counsel's Exh. 44A.

Under the circumstances of this case, the employer is in a uniquely powerful and favorable bargaining position. The Goliath and David aspect of this bargaining is suggested by the ratio of Prudential's assets to Respondent's total membership: Prudential, the employer here, had over one million dollars in assets for every single member of Respondent.⁵

The potential effect of a strike or stoppage by these insurance Agents is markedly different from the potential effects of similar action by employees in a factory or other more typical industrial contexts. Prudential would continue to receive its tremendous volume of investment income; and in addition, the policyholders would be under unique compulsion to continue their payments. If their policies were to lapse, they would lose all accumulated benefits as well as the financial protection which is a necessity of life; and the Company in the meantime would retain all premiums paid and be relieved of all liability on the lapsed policies. It was stipulated at the Board hearing that policyholders could pay premiums at the Prudential offices and were not required to pay premiums to the Agents who regularly collect them.

The "product" of the insurance industry is continuing financial protection. There is no question of short supply, at least for this Company. Sales results necessarily depend on a variety of imponderables. They are not scientifically predictable like the production of machines.

In this case, as the interplay of economic forces between employer, employee and consumer has the unique character-

⁵ The Company had assets of over \$12,500,000,000 according to its 1955 annual report. Resp. Exh. 2, Hearing before NLRB Trial Examiner. Respondent's 1956 membership was 11,000. U.S. Dep't of Labor, Bureau of Labor Statistics, *Directory of National and International Labor Unions in the United States, 1957*, 35. This is total membership, all Companies. This Company had over a million and a half dollars for each of its "7,000 or 8,000 Agents involved." Co. Br., 19.

istics outlined above, there is no vitality or meaning to the concepts of production schedules and delivery commitments which are so central to the Board's decision in *Textile Workers* and this Court's discussion in *Automobile Workers v. Wisconsin Board*, 336 U.S. 245, and thus to the petition in this case.⁶ Likewise, the concepts of "scheduled hours," Pet., 2, "normal working hours," Pet., 5, and "intermittent refusals to work," Pet., 10, have real meaning for factory workers but simply cannot be applied to insurance Agents.

The employment conditions of insurance Agents are unique. The Board's own witness, a Company official, testified that "the job of an agent is utterly different than that which you see every day" and "The very nature of the job precludes setting a number of hours." J.A. 27, n. 7. These Agents adjust their own working schedules to the needs of their clients and prospects. Except for reporting to the Company district office two mornings a week for brief meetings and the completion of their extensive paper work, the Agents spend the time they work in the field on their "debits" (their assigned territories).

The compensation of the Agents depends on the results achieved, not on the hours worked. None of them is paid on a straight time basis.⁷ Their compensation is entirely on a complex commission basis, except for a \$7.00 weekly "special debit allowance" which is understood to be in lieu of reimbursement for actual expenses, chiefly transportation, incurred in the performance of their duties.

⁶ Petitioner recognizes this in its omissions if not in its expressions. Petitioner omits the words italicized as follows in its quotation from *Automobile Workers v. Wisconsin Board*, 336 U.S. 245, 249, although it included them in its *Textile Workers* petition: "These tactics were intended to and did interfere with production and put strong economic pressure on the employer, who was disabled thereby from making any dependable production plans or delivery commitments." Cf. asterisks, Pet. 13, with words, T.W. Pet., 13.

⁷ In *Textile Workers*, "There were employees who were paid on a straight salary basis." T.W. Bd. Br., this Court, 30, n. 14.

There are many separate commissions, varying with the function performed—collection of premiums, servicing and conservation of established business, sales of new business—and with the type and amount of the particular policy.

If it is necessary to state the obvious, these Agents earn no compensation if they perform no work; they receive no sales commissions, for example, if they sell no new business.

In the light of these facts, there is no support in this case, however appropriate it might have been in the other, for Petitioner to state that the "loss of commissions is hardly to be compared with the total loss in pay involved in a strike;"* or that "The economic pressure is largely one-sided, with little compulsion upon the union to reach an accord other than upon its own terms." Pet., 13.

The assumptions applicable to industrial relations gen-

* Pet., 12, n. 6. It would appear, again, that these words were simply taken from papers prepared for the other case, here T.W. Bd. Br., this Court, 30, n. 14, without consideration of their applicability to this different record. The Company recognizes that the Agents received no compensation for unperformed services, for it says only that "The Agent's compensation is only a part of the Company's expense," Co. Br., 13. The other expense would of course continue in a total strike in exactly the same degree.

The evidence as to the nature of the industry and the employment is contained in the exhibits submitted in evidence at the Board hearing. The commission rates, for example, are set forth in detail in General Council Exh. 25, the contract between the parties which expired on March 18, 1956.

That contract contained a provision covering both complete strikes and the Union activities engaged in here. J.A., 27. There is no claim that Respondent engaged in any of these activities during the life of the contract. Such clauses are typical in this industry. If it is "common collective bargaining practice in the industry" to equate partial and complete strike activities, the Board may not substitute its judgment for that of the parties in the absence of express statutory mandate; it "was not empowered to disrupt collective bargaining practices." *Labour Board v. American Ins. Co.*, 343 U.S. 397, 408. The "Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice." *Carpenters' Union v. Labor Board*, 357 U.S. 93, 108.

erally are wholly inapplicable on this record. This is a unique case.

5. This case comes to the Court in the posture of an abstract and extreme Board position. The Board found bad faith bargaining solely because of the occurrence of "harassing tactics," *per se*. The Board did not consider the facts of record affirmatively establishing that Respondent had bargained in good faith. It relied on its *Textile Workers* decision, despite the antithesis between the facts of record here and those relied on there.

A. In *Textile Workers*, the Board decision rested primarily on the actual impact and effectiveness of the Union tactics. "These unprotected tactics," the Board found, "interfered with production and put strong economic pressure on the employer who was thereby disabled from making any dependable production plans or delivery commitments." 108 NLRB at 746. These words are largely quotation from *Automobile Workers v. Wisconsin Board*, 336 U.S. 245, 249, where this Court stressed the practical impact on the employer as a special distinguishing mark of the tactics there utilized.

The interference and pressure which the Board considered necessary in *Textile Workers* were inexplicably considered irrelevant in this case. The Board decision here flatly denied that it was necessary to show that the Union conduct "actually affected . . . the Company's business." J.A., 37.

B. Similarly, in *Textile Workers*, the Board relied on the fact that "The Employer was not informed of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them." 108 NLRB at 746.

In this case, on the other hand, as the Trial Examiner found, "the record is replete with documentary evidence,

including thousands of pages of the bargaining record, proving that the employer was at all times well informed as to the 'specific demands which these tactics were designed to enforce' and 'what concessions it could make to avoid them,' . . . The Employer was aware of all directives of the Union, concerning planned and prospective activities, *before* their effective date. In no respect may it be found that the employer here was 'harassed' by the element of surprise, depriving it of opportunity to take appropriate counter measures." J.A., 26 (emphasis in original).

C. To prove that it did in fact bargain in good faith, Respondent submitted as its Exhibit 1 at the Board hearing the many volumes of the bargaining record as well as a stipulation covering the course of the bargaining on the paramount issue dividing the parties. This case is most unusual in that the parties had an impartial reporter at most of the bargaining sessions, which took place on a regular and virtually daily basis from January 16 to June 29, 1956, so that the actual give and take of the bargaining is part of the record.

This bargaining record was considered by the Trial Examiner. His conclusion was "that but one inference is possible . . . the Union's motive was one of good faith." J.A., 34. All the evidence in the case, considered as a whole, according to the Trial Examiner, "clearly establishes good faith bargaining."

"J.A. 32-33. Whereas the Trial Examiner in the *Textile Workers* case found that the Unions there had violated the Act, the Examiner here, who did review the entire record and based his Report thereon, dismissed the complaint, holding both that the charge had not been proved and that the defense of good faith bargaining had been affirmatively established. In judging the weight to be accorded the Examiner's finding, the following teaching of this Court is pertinent: "Both statute: The Administrative Procedure and Labor Management Relations Acts] thus evince a purpose to increase the importance of the role of examiners in the administrative process. High standards of public administration

The Board dismissed the Union's conduct at the bargaining table as completely irrelevant, holding, "it is unnecessary to show . . . that this conduct actually affected the negotiations . . ." ¹⁰ In refusing to consider Respondent's defense that it had in fact bargained in good faith and in disregarding the bargaining record submitted in proof of that defense, the Board evidently assumed that there were no possible circumstances in which a Union could possibly be using "harassing tactics" and still be bargaining in good faith. On this assumption, it would not consider whether there was good faith bargaining under the particular circumstances of this case. As the Intermediate Report points out, the Board's "case boils down to saying that even if there was good faith bargaining in fact, there could not have been in theory." J.A., 29.

counsel that we attribute to the Labor Board's examiners both the regard for the responsibility which Congress imposes on them and the competence to discharge it." *Universal Camera Corp. v. Labor Board*, 340 U.S. 471, 495.

¹⁰ J.A., 37. In *Textile Workers*, on the other hand, the Board in its decision did rely upon the lack of notice to the employer, as discussed in the text; and the Board relied on the actual negotiations in large part in its position before the Court of Appeals. The Board there relied on "The Unions' entire course of conduct, including the positions taken by them at the bargaining table and their resort to harassing tactics away from the bargain table . . ." T.W. Bd. Br. C.A.D.C., 23; and it discussed as a distinguishable and presumably relevant issue "The Unions' approach to the negotiations and positions taken at the bargaining table." *Id.* at 28-9. The point of this was to prove that the Unions had taken an "all-or-nothing attitude". *Id.* at 29. The Board then took the position that the prevention of "all-or-nothing" bargaining was the legislative purpose and effect of Section 8(b)(3). *Id.* at 27-28; 108 NLRB at 746, n. 10.

Further, the Board relied upon an alleged refusal of the Unions to take responsibility for the employees' activities. The Board alleged that the Unions at the bargaining table "sought to disown all responsibility for these tactics" and made "representations at the bargaining table, that the harassing tactics were not authorized by the Unions." T.W. Bd. Br. C.A.D.C., 33, 36. Indeed, the Board entitled a portion of its argument, "The Unions' simultaneous use of harassing tactics to compel acceptance of their terms and their disingenuous disavowal of responsibility therefor." *Id.* at 29, 29-34.

D. In the *Textile Workers* case, it was theoretically possible, upon judicial review, to sustain the Board decision as based upon an examination of the entire record; and the dissenting opinion in the Court of Appeals was in fact based on this ground.¹¹ That position is unavailable in this case. The Board did not examine the entire record here; instead, it took the position that the solitary relevant fact was the occurrence of these activities which constituted an unfair labor practice, *per se*. On judicial review of such a Board decision, there is no alternative to setting the Board order aside.

6. The judgment below is plainly correct on this record.

A. It is well established that the Board cannot be sustained when it finds bad faith bargaining on a *per se* rationale or when it fails to consider all the facts in a particular case. The decisions of this Court, while arising in the context of charges against employers, have made very clear what the Act requires of the Board in a case involving a charge of bad faith bargaining.

In *Labor Board v. American Ins. Co.*, 343 U.S. 395, 409, for example, this Court spoke as follows:

"Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, *per se*, an unfair labor practice. Any fears the Board may entertain that use of

¹¹ Petitioner itself summarizes the opinion as based "on the totality of the record." Pet. 10. In addition to relying on the Board findings which are mentioned in the text, the dissenting Judge relied on "other coercive conduct," not controverted by the Unions in that case (of which there is none in this case), which was held to be part of the "whole record" to which the Board could look in support of its order. Pet. 32, 97 U.S. App. D.C. at 70, 227 F.2d at 414.

The Company recognizes that the Board did not consider the entire record in this case, for it states (as Petitioner does not) that it "welcomes a consideration of this entire record" by this Court. Co. Br., 20. It agrees that the differences between the two cases "are more than differences in degree." *Id.* at 24, although it perceives different differences from those discussed in this Brief.

management functions clauses will lead to evasion of an employer's duty to bargain collectively . . . do not justify condemning all bargaining for management functions clauses covering any 'condition of employment' as *per se* violations of the Act. The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8 (d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether."

These words are directly applicable to this case. The Board's holding here that any use of any Union activity it regards as "harassing" be, *per se*, an unfair labor practice, must likewise be rejected. The Board's fears that use of such tactics may lead to a violation of the Act cannot justify condemning all use of such tactics as *per se* violations.

Whatever the specific issue involved, this Court has emphasized that "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." *Labor Board v. American Ins. Co., supra*, at 410. On the issue of whether an employer must make economic data available in bargaining, for example, the Court cautioned the Board that a finding of unfair practice was being sustained only "under the facts and circumstances of this case", for "Each case must turn upon its particular facts." *Labor Board v. Truitt Mfg. Co.*, 351 U.S. 149, 153. The dissenting Justices were in no disagreement with this principle, for they held the Board had in fact not reviewed the entire record, including such factors as the "previous relationship of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations," but had instead made "a rule of law out of one item—even if a

weighty item—of the evidence. There is no warrant for this." *Id.* at 155. As this is precisely what the Board did here, its order could not stand.

"Congress has . . . made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record *in its entirety* furnishes, *including the body of evidence opposed to the Board's view.*" *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 488 (emphasis added).

B. An additional fatal defect in the Board decision requiring it to be reversed, the contravention of Section 8 (c), has already been discussed. See pp. 6-7, *supra*.

7. The Circuit Court's *Textile Workers* decision is plainly correct. It relies primarily on the complete consistency between bargaining in good faith and applying economic pressures, whether the pressures take the form of partial or complete strikes. Respondent submits that this decision is required by the Act: No valid distinction can be drawn between "harassing tactics" and the "strikes" expressly permitted by the Act, with regard to the Union's intention to bring pressure on the employer during contract negotiations.

In addition to this fundamental ground, the *Textile Workers* decision notes that the Congressional purpose in Section 8 (b) (3) was to outlaw Union bargaining on an ultimatum or "take it or leave it" basis, and that there was no such Board finding (as there could be none in the instant case). Petitioner evidently does not attack the Court's reliance on this legislative history,¹² although this ground is sufficient independently to sustain the Court below in both cases.

¹² The Board agreed with it, at the time of the *Textile Workers* case. See note 10, *supra*, p. 13.

Petitioner does attempt to attack the fundamental ground of the *Textile Workers* decision, Pet. 10-15, but each of its charges can be easily repulsed.

A. The discussion to this point in the Brief has demonstrated that the basic assumptions Petitioner uses to attack *Textile Workers* simply have no support or foundation whatever on *this* record. Petitioner's references to "outside the protection of the Act", Pet., 10, 15, for example, are disposed of in point 3, *supra*, pp. 6-7; to the employees' continuing "to collect wages" or "accept compensation" without work, Pet., 11, 12, by pp. 9-10, *supra*; to the lack of strong pressures on Respondent, Pet., 13, by pp. 7-10, *supra* (this record shows, incidentally, that the ultimate agreement was very far indeed from Respondent's desires); to the claimed similarities with *Automobile Workers v. Wisconsin Board*, 336 U.S. 245, Pet., 13-14, by pp. 11-12, *supra* (glaringly inapposite to this case involving advance notice to the employer is Petitioner's quotation of this Court's quotation of the Union's statement about "surprise" in that particular case. Pet., 13). The adjective "production-disrupting", Pet., 14, is hardly appropriate to a case where the concept of "production" lacks genuine or general content and where the Board expressly disclaimed the need or relevance of any finding on the actual impact or "disruption" effect of the Union tactics.

B. Petitioner's references to the weapons which are traditional and which must be available in free collective bargaining, Pet., 12, are utterly devoid of any support in this record. No evidence whatever was even offered on the venerability or innovation, or relationship to free collective bargaining, or the relative fairness or unfairness, of any Union tactic used in this case, as to the economy generally, this industry or this particular contract negotiations.

C. The "diseases of collective bargaining" quotation, Pet. 12, as the footnote makes clear and as Respondent pointed out in the Court below, is in the context of Union activities in violation of a subsisting contract, an issue having nothing to do with this case.¹³

D. The choice confronting the employer, Pet., 12-13, is no different from that in a complete strike; or if there is a difference, the employer is obviously better off with some operation of his business, rather than none. In this case, Prudential preferred the "harassing tactics" to a complete strike, for it voluntarily elected not to change the situation. After all, as the Trial Examiner found, "There is no evidence in the record to show that the servicing of existing policyholders was in the slightest degree affected—as presumably would have been the case in a full strike." J.A., 27.

E. Petitioner's references to good faith bargaining as reasonable discussion, Pet., 14, are inappropriate to this record and are obviously incorrect. The record here shows that Respondent did indeed participate in the bargaining sessions in reasonableness and in good faith. This was the finding of the Trial Examiner; and the Board could reach the opposite conclusion only by zealously disregarding the bargaining record and other evidence.

¹³ The following is the context:

"If the machinery for enforcing the agreement is written into it and a method of final determination of grievances under it is provided, work stoppages during the life of the agreement are violations of the intent and purpose of the collective agreement. On-the-job pressures, such as slow-downs, quickies, disruptive Union meetings during working time, are diseases of collective bargaining, not of its nature." Peck, *Factors in Successful Collective Bargaining*, Staff Report for the Subcommittee on Labor and Labor-Management Relations of the Senate Labor and Public Welfare Committee, 82d Cong., 1st Sess., '9. Clearly the only reference is to the use of such tactics during the life of a collective bargaining agreement:

Moreover, the implication that good faith bargaining is inconsistent with the use of economic pressure such as a strike is clearly contrary to the spirit and letter of the Act, and is inconsistent with the position the Board took before this Court in *Textile Workers*.¹¹

F. Petitioner's reliance on the *Crompton Mills* case, on the analogy of unilateral changes in working conditions, Pet., 14-15, is unsound. As that case itself makes clear, the unilateral change of conditions by an employer is not a violation under all circumstances. *Labor Board v. Crompton Mills*, 337 U.S. 217, 224. Where the issues have been fully bargained out, such changes may be lawful. Unilateral changes are unlawful only to the extent that they undermine the bargaining representative and demonstrate the employer's unwillingness to deal with the Union. The crucial factor of "without prior consultation with the bargaining representative" was reiterated by this Court and is obviously the basis for the holding of violation in *Crompton Mills*, 337 U.S. at 218, 219, 221, 222, 223, 225. There is no such factor in the instant case. Respondent obviously continued at all times to deal with the employer's representatives and to negotiate with them.

In sum, none of Petitioner's efforts to disparage the Circuit Court's *Textile Workers* decision achieves success or validity.

¹¹ "Congress also regarded, of course, that the collective bargaining mechanism cannot function in the absence of economic sanctions available to both parties. If one party to the negotiations is unable to support its proposals and resist the demands of the other by an effective threat of resort to economic power, it is evident that terms of employment will be established by fiat of the other, not through the bargaining process." T.W. Bd. Br., this Court, 26; 12, 27. In the comprehensive review of national labor policy which culminated in the Labor Management Relations Act, Congress specifically prohibited certain types of Union "harassing tactics," and meant to permit the rest. Cf. *Carpenters' Union v. Labor Board*, 357 U.S. 93. There was certainly no express or implied prohibition of the Union activities involved in this case.

"Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393; Revised Rules of the Supreme Court of the United States, Rule 38 (5)." *Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502.

Conclusion

For the reasons set forth herein, the petition should be denied.

Respectfully Submitted,

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(3657-4)

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No. 15

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**INSURANCE AGENTS' INTERNATIONAL UNION,
AFL-CIO**

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

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OPINIONS BELOW

The opinion of the court below (R. 154) is reported at 260 F. 2d 736. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 43-44) are reported at 119 NLRB 768.

JURISDICTION

The court below entered its judgment on October 23, 1958 (R. 154-155). The petition for certiorari was filed on December 4, 1958, and granted on January

26, 1959 (358 U.S. 944). The jurisdiction of this Court rests on 28 U.S.C. 1254, and Section 10(c) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*); are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. * * * (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) * * *.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the

execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *

* * * * *

Section 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

* * * * *

Section 501 of the Labor Management Relations Act, 1947 (61 Stat. 136, 161) provides,

When used in this Act—

* * * * *

(2) The term "strike" includes any strikes or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

QUESTION PRESENTED

During the course of collective bargaining negotiations the Union, which was the collective bargaining representative of the employees, instigated a series of harassing tactics, including refusals to write new business, refusals to work scheduled hours, refusals to make reports in the manner provided by the employer, and refusals to participate in Company conferences and promotion plans. By these tactics, the Union sought to compel the employer to accede to its

bargaining demands. The question presented is whether, as a matter of law, the Board erred in finding that, in using such tactics as a means of bringing pressure upon the employer to yield to its demands in the pending negotiations, the Union violated its statutory obligation to bargain collectively in good faith.

STATEMENT

I. The Board's findings of fact

Briefly, the Board found that during the course of bargaining negotiations with the Prudential Insurance Company of America, herein referred to as the "Company," respondent Union engaged in "harassing tactics * * * for the avowed purpose of compelling the Company to capitulate to its terms" (R. 30). The Board concluded that the Union's conduct did not constitute bargaining in good faith, and hence was violative of Section 8(b)(3) of the Act (R. 32). The Board based its conclusion upon the following subsidiary facts:

The Union has represented the Company's district agents for a number of years (R. 27). On January 16, 1956, about two months before the expiration date of the contract then in effect, the Union and the Company began negotiations for a new contract (R. 27-28). On March 13, the Union notified its members that unless agreement on contract terms were reached by March 19, a "work without a contract" program would be put into effect (R. 28; 66-67).

The parties failed to reach agreement by the given date, and the bargaining negotiations continued.

Although still participating in the bargaining sessions, the Union then began its "work without a contract" program by instructing its members for the week beginning March 19 not to write new business and to picket, demonstrate, and distribute leaflets before the Company's offices on Wednesday and Friday of that week (R. 28; 66-67). As indicated by these initial instructions, the Union's "work without a contract" program was designed to put pressure on the Company to accept the Union's bargaining demands by requiring the district agents to engage in "slow downs" and other harassing tactics during the course of contract negotiations. The program was thereafter continued in effect by means of weekly directives to the officers and members of the Union's locals. The "harassing tactics" which the district agents engaged in at the Union's orders may be summarized as follows:

1. From March 19 to May 7, the district agents refrained from writing new insurance. When they resumed the writing of new business, the district agents, in disregard of Company instructions, refused to make any report of such business to staff managers or permit them to see any insurance applications but instead deposited them "in the chute" apparently for mailing direct to the Company's home office (R. 28-29; 66, 107).

2. The Company's working rules require district agents to report to their district offices every Tuesday and Friday at 8:30 A.M., for meetings, instructions, and financial accounting. The Union instructed its members to "sit-in" on Tuesday morning,

March 27, adding that "All the agents will report to the office but not before 10 A.M. and remain in the district or detached office until 12 noon, doing what comes naturally. At 12 noon all Agents will depart in a group" (R. 28; 71). Similar instructions to report late and to "sit-in" until noon on Tuesdays and Fridays were included in subsequent directives (R. 28, 76; 100-101).

3. Agents are expected to attend business conferences which the Company schedules regularly as part of its training and sales program. On April 12, and in subsequent directives, the Union notified its members, in an "all-go-or-no-go" program, not to attend such business conferences (R. 29; 88).

4. The Company sponsored a special sales campaign from May 21 to June 22, termed "May Policyholders' Month." At the Union's direction, the district agents ignored the campaign, refusing to attend special meetings, to accept campaign material supplied by the Company, or to work evenings (R. 29; 100).

5. From March 19 to June 21, the Union directed its members to picket the Company's offices during certain of their normal working hours and, beginning with the week of April 9, the Union further instructed its members to secure policyholders' signatures on petitions urging the Company to negotiate a contract with the Union "which will provide fair and favorable working conditions" (R. 71, 80-81, 85-86). On April 27, pursuant to Union orders, the district agents participated in mass demonstrations before the Company's home offices while signed

policyholders' petitions were being presented to the Company (R. 29; 97).

In its directives to its local officers and members, the Union strongly emphasized the importance of carrying out the "work without a contract" program, if the Union was to prevail in its bargaining demands. Thus, on April 16, the Union declared in a directive to its local officers: "Remember, the successful conclusion to a fair and equitable contract depends on the extent to which the members of the Union participate in the activities outlined for them. ~~The contract will be won in the field—not at the negotiating table~~" (R. 92). On June 4, 1956, the Union reiterated its position that "the contract will be won in the field and not at the negotiating table" (R. 103). Not content merely with exhorting its members to carry out the "work without a contract" program, the Union disciplined members who failed to participate in the program (R. 64, 105-106, 109).

The Union encouraged its members to participate in the "work without a contract" program by describing the impact of this campaign of harassing tactics on the Company. In its directive of March 28, the Union informed its members that the program "is having a decided effect upon management and its success has been the subject of discussions at the bargaining table" (R. 30, n. 8; 72). Similarly, on April 12, the Union declared, "you know that the Company is unhappy because our membership are able to draw their salaries while continuing the program" (R. 32, n. 14; 90).

The Union further demonstrated its reliance on its program of harassing tactics at bargaining sessions with the Company. Thus, on Friday, March 23, a few days after the start of the "work-without-a-contract" program, Union negotiator Ed Smailer declared (R. 143):

In the last analysis, we have merely added more negotiators. The contract has expired. Under the law of the land we are permitted to carry out certain concerted activities in order to bring the employer to a more receptive attitude toward our legal demands. We just have more negotiators, and this is a labor union.

The "work without a contract" program ended on June 21, when the Union advised the agents that sufficient progress had been made in negotiations to warrant its discontinuance "until further notice" (R. 29; 104). The parties executed a new contract on July 17, 1956 (R. 28, n. 3).

II. The Board's conclusions and order

The Board found that the Union, while purporting to negotiate its differences with the Company, engaged in a series of harassing tactics "designed to force the Company to yield to its bargaining demands" (R. 28). The Board regarded such tactics as not reflecting the good faith requirement of the Act, holding that they were irreconcilable with the duty imposed by the Act upon both employers and unions to engage in bargaining with an "open and fair mind" and "with a willingness to let ultimate decision follow a fair opportunity for the presenta-

tion of pertinent facts and arguments" (R. 29-30). Viewing the Union's conduct as not sanctioned by the Act, and therefore materially different from a legitimate strike, the Board held that such conduct during bargaining negotiations warranted an inference of bad faith (R. 30-31). Accordingly, the Board concluded that the Union, by engaging in harassing conduct during the course of bargaining with the Company, violated its statutory duty to bargain in good faith, as required by Section 8(b)(3) of the Act (R. 32). In so holding the Board relied on its decision in *Textile Workers Union*, 108 NLRB 743, set aside, 227 F. 2d 409 (C.A.D.C.), certiorari granted *sub nom. National Labor Relations Board v. Textile Workers Union*, 350 U.S. 1004, order granting certiorari vacated and certiorari denied, 352 U.S. 864 (R. 31, n. 11; 32).

The Board's order (R. 34-37) requires the Union, so long as it remains the representative of the Company's employees, to cease and desist from refusing to bargain collectively in good faith with the Company by engaging in harassing tactics in order to force the Company to accept its bargaining demands. The order further requires the Union to post appropriate notices.

III. The holding of the court below

The Court of Appeals set aside the Board's order, noting that the case was indistinguishable from *Textile Workers*, *supra*, 227 F.2d 409 in which the court, by divided vote, had set aside a similar order. In the instant case the court did not reexamine the

issue, but stated that "One panel of this court will not attempt to overrule a recent precedent set by another panel, even though one or more of its members may disagree with the ruling" (R. 154).

In the *Textile Workers* case, the court below, stating that "[t]here is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants", concluded that "the Board's theory that such [harassing] tactics are evidence that a union is not bargaining in good faith * * * will not stand analysis" (227 F.2d at 410). The court stated that the union might have called a strike; that "no inference of failure to bargain in good faith could have been drawn from a total withholding of services, during negotiations, in order to put economic pressure on the employer to yield to the Union's demands"; that it was, "equally clear that no such inference can be drawn from a partial withholding of services at that time and for that purpose"; and that except for such specified conduct as jurisdictional and secondary strikes, the Act does not limit "the use of economic pressure in support of lawful demands" (*ibid.*). Citing this Court's decision in *Automobile Workers v. Wisconsin Board*, 336 U.S. 245, the court further held that the conduct in question is "not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner" (227 F.2d at 411).

SUMMARY OF ARGUMENT

A. This Court and the courts of appeals have uniformly recognized that the protection of the National

Labor Relations Act does not extend to such concerted activities as slowdowns, intermittent work stoppages and similar harassing tactics. Employees who engage in such unprotected activities are vulnerable to discharge and have no recourse to the guarantees of the statute. The basis of decision in these cases has been that activities of this kind are repugnant to the statutory purposes. Such conduct, when used as an adjunct to bargaining negotiations, can also properly be considered by the Board to be incompatible with the statutory obligation to bargain collectively and in good faith. The duty to bargain in good faith is not satisfied by a mere showing that the party has a genuine desire to come to an agreement or that he has negotiated toward that end at the bargaining table. Observance of the statutory obligation also implies a duty to maintain the integrity of the bargaining process which Congress incorporated in the Act.

B. The Board's ruling, forbidding disruptive on-the-job tactics like the ones in this case, which differ wholly from a strike in nature and effect, conforms to the statute. Although Congress did specifically prohibit some actions by unions, such prohibitions were not exhaustive. Congress did not purport to catalogue all of the economic weapons which it deemed incompatible with the bargaining process. Necessarily, it left to the Board a broad area within which to determine in specific cases whether concerted activity which is not within the protection of Section 7 of the Act, but is not specifically prohibited by the statute, may nevertheless support a

finding of a failure to bargain in good faith. This is such a case.

The collective bargaining mechanism cannot function properly in the absence of economic sanctions available to both parties. Of course, these sanctions need not be equal in their potential or actual effectiveness. Congress recognized that the strike threat and the actual strike itself are traditional and appropriate weapons as instruments of collective bargaining. The employer weighs his proposals in terms of the union's willingness or ability to strike if an impasse is reached and the cost to him if a strike is called. On the other hand, the union, while it may resort to strike action, must also weigh the cost to it and its members. Knowledge on both sides of the respective economic power of each and an awareness of the cost involved in the exercise of that power tempers the relationship and encourages both to resolve their differences in a spirit of "give and take." This was the philosophy of collective bargaining which the Act was intended to further. Accordingly, the right to strike is expressly recognized by the Act and as a fair and time-honored weapon in the labor movement enjoys a particular and peculiar status under the statute which seeks to foster industrial peace.

Unlike the conventional strike, which is an integral part of the bargaining process, on-the-job pressures such as slowdowns, intermittent work stoppages, and the like are "foul blows", not protected by the statute, and their availability is neither essential nor appropriate to free collective bargaining. They have

been accurately described as diseases of collective bargaining, not an intrinsic aspect of its nature. Destructive economic sanctions of this type are inconsistent with "good faith" collective bargaining. They cost one party little or nothing in relation to the disadvantage imposed upon the other. They do not facilitate agreement in the spirit of give and take contemplated by the Act because the party using them is under no substantial economic constraint to come to agreement except upon his own terms. With the economic pressure largely one-sided, with relatively less compulsion upon the union to reach accord except upon its own terms, the Board could properly conclude, as it did, that these tactics take on "more the character of coercion than of collective bargaining" (*National Labor Relations Board v. Electrical Workers*, 346 U.S. 464, 477). If this type of conduct is so repugnant to the statutory policies as to furnish legal justification for dismissal of the employees who participate in it, there is reasonable basis for the Board to find, as it has done here, that the use of such tactics evidences a failure to bargain in good faith within the meaning of the Act.

That the employer has a right to discharge employees who engage in these tactics does not preclude the Board from finding such conduct to be violative of the duty to bargain. The emphasis of the statute is on practices and procedures conducive to the peaceful adjustment of labor disputes. This purpose would not be served if the Act were construed to mean that the employer's sole recourse is to discharge the employees or force the union out on strike and

thereby disrupt the bargaining relationship. The legislative purpose clearly was to promote industrial peace, not to provoke strikes or other forms of economic strife. A reading of the statute which leaves the employer, where the union is not bargaining in good faith, with only the choice of dismissing those employees who engage in the improper tactics would fail to give full effect to Section 8(b)(3), which seeks to preserve and enhance the stability of the bargaining relationship.

Section 501 of the Labor Management Relations Act, defining "strike" to include slowdowns and similar activities, affords no basis for setting aside the Board's decision. ~~This Court has rejected the argument that Section 501 should be coupled with Section 13 of the National Labor Relations Act, as amended, which protects the right to strike against impairment except as provided in the statute, so as to give affirmative statutory sanction to the harassing tactics involved here. Such a constrictive interpretation of the statute would clearly be at odds with its basic design and purpose.~~ *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245.

ARGUMENT

The Board Properly Found That the Union's Use of Harassing Tactics to Compel Acceptance of Its Bargaining Demands Was Incompatible With the Statutory Duty to Bargain Collectively

The question is whether the Board may properly find that a union violates the statutory obligation to bargain in good faith when it causes the employees

to engage in slowdowns, intermittent refusals to work, and other on-the-job actions calculated seriously to disrupt or injure the employer's business for the purpose of compelling submission to its bargaining demands. This Court and the courts of appeals have uniformly recognized that union conduct of this kind is not concerted activity within the meaning and protection of Section 7 of the Act and that an employer may lawfully discharge employees for engaging in it. *National Labor Relations Board v. Electrical Workers*, 346 U.S. 464; *Automobile Workers v. Wisconsin Board*, 336 U.S. 245.¹ In *Textile Workers Union v. National Labor Relations Board*, 227 F. 2d 409, which is the basis of the decision in the instant case (*supra* p. 10), the court below gave recognition to this established proposition. However, perceiving no difference between such tactics and the traditional strike as a means for exerting economic pressure on the employer to yield to a union's demands, it

¹ Accord: *C. G. Conn Ltd. v. National Labor Relations Board*, 108 F. 2d 390 (C.A. 7); *National Labor Relations Board v. Condenser Corp.*, 128 F. 2d 67 (C.A. 3); *Home Beneficial Life Insurance Co. v. National Labor Relations Board*, 159 F. 2d 280 (C.A. 4), certiorari denied, 332 U.S. 758; *National Labor Relations Board v. Draper Corp.*, 145 F. 2d 199 (C.A. 4); *National Labor Relations Board v. Indiana Desk Co.*, 149 F. 2d 987 (C.A. 7).

Respondent's assertion (Br. Opp. 6) that the picketing and distribution of leaflets, which were one phase of the harassing tactics in the instant case, were free speech activity protected by Section 8(c) overlooks the fact that the unprotected character of such activity stems not from the views expressed by the pickets but from the circumstance that the picketing was engaged in during working time.

sanctioned the use of these tactics as a permissible collective bargaining weapon. In effect, the decision below leaves only two alternatives to an employer subjected to these tactics: (1) to discharge the employees, or (2) to bargain with the union while the employees continue in their employment, drawing compensation in part or in whole but at the same time refusing to perform all their work and seriously disrupting the orderly operation of the employer's business.

In our view, the Board could appropriately determine that the basic statutory purpose of promoting industrial peace through the collective bargaining process would be defeated by sanctioning resort to this form of industrial warfare as a collective bargaining technique. The Board, charged by Congress with the duty of implementing in detail the broadly stated statutory duty to bargain collectively in good faith, was entitled to infer from such conduct that the Union had violated this duty, and we submit that the Court of Appeals erred in holding that, as a matter of law, "no such inference can be drawn" (*supra*, p. 10).

A. *The statutory duty to bargain collectively in good faith requires both employers and unions to refrain from conduct which impairs the bargaining process*

One of the basic purposes of the Act is to "encourag[e] the practice and procedure of collective bargaining" as an instrument for promoting and achieving industrial democracy, stability and peace. Section 1 of the Act. In furtherance of this national

policy, the Act requires both employers and unions alike to bargain collectively. Section 8(a)(5) and 8(b)(3) implement this objective and make it an unfair labor practice, respectively, for either an employer or a union, under the conditions prescribed in the statute, to refuse to bargain collectively. Section 8(d), in turn, defines the duty to bargain collectively to mean

* * * the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement * * * and the execution of a written contract incorporating any agreement reached if requested by either party * * *.

Congress did not further particularize the nature and character of the duty thus prescribed. The Act "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346. Within this broad framework, Congress left it to the Board to infuse meaning and content in the statutory mandate through a continuing examination of collective bargaining practices. A "statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application." *Phelps Dodge Corp. v.*

National Labor Relations Board, 313 U.S. 177, 194. "Congress. advisedly left the concept flexible to be defined with particularity by the myriad of cases" coming before the Board. *Federal Trade Commission v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394. In short, it is for the Board, primarily, to prescribe the "ground rules" of collective bargaining in the light of the objectives which the Act seeks to achieve.

In carrying out this function the Board has stated the broad test of good faith bargaining to require the parties to have a sincere desire to reach an agreement and to that end make every reasonable effort to reach common ground. E.g. *National Labor Relations Board v. Boss Mfg. Co.*, 118 F. 2d 187, 189 (C.A. 7); *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 118 F. 2d 874, 885 (C.A. 1). The cases which come before the Board upon charges that a party has refused to bargain in good faith involve for the most part an evaluation of the parties' subjective state of mind, as evidenced by their conduct, to determine whether they have negotiated with a genuine desire to compose their differences and reach an agreement. But this factor is not the sole measure of the bargaining obligation. The duty to bargain in good faith is not always satisfied by a mere showing that the parties have evidenced a genuine desire to come to an agreement. It also embraces a duty to refrain from conduct which, viewed in the context of the statutory purposes and objectives, may fairly be said to be incompatible with the "philosophy of bargaining" embedded in the Act.

Thus, for example, "good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining." *National Labor Relations Board v. Wooster Division, Borg-Warner Corp.*, 356 U.S. 342, 349. Similarly, an employer who refuses to memorialize a collective bargaining agreement in a written document;² or withholds wage data from a union for purposes of negotiating an agreement or administering a collective bargaining contract; or acts unilaterally in changing conditions of employment violates the duty to bargain in good faith. *H. J. Heinz Co. v. National Labor Relations Board*, 311 U.S. 514, 525-526; *National Labor Relations Board v. F. W. Woolworth Co.*, 352 U.S. 938; *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-226. The statute nowhere states these restrictions upon the scope of bargaining in so many words. Nor did decision in these cases rest upon a determination whether or not the employer had a genuine desire to reach agreement. Essentially, the decisive factor was that the action of the employer, irrespective of his subjective state of mind, either impaired the integrity of the collective bargaining process or did not comport with "the philosophy of bargaining as worked out in the labor movement in the United States" (*Order of Railroad Telegraphers, supra*, 321

² This was true even under the original Act which, unlike the amended statute did not specifically provide for the incorporation of collective bargaining agreements in a written contract. *Heinz, supra*.

U.S. at p. 346) which Congress in general terms incorporated into the statute under the rubric "to bargain collectively * * * in good faith."

That the statutory duty to bargain in good faith embraces more than a desire to reach an agreement is confirmed by Section 8(b) (3) of the amended Act and its legislative history. The original Act which required employers to bargain collectively imposed no corresponding duty upon unions. In 1947, it was proposed that the Act make it an unfair labor practice for unions, as well as employers, to refuse to bargain collectively. The proposal was resisted on the ground that it was unnecessary since "Labor organizations exist for the purpose of collective bargaining * * *" (H. Min. Rep. No. 245, 80th Cong., 1st Sess., p. 83, 1 Leg. Hist. (1947) 374).³ Congress found, however, that experience demonstrated that unions, despite their basic purpose, may sometimes engage in practices which "frustrate the duty to bargain collectively," and that it was necessary to incorporate in the Act a provision guarding against such practices. 93 Cong. Rec. 4135, 2 Leg. Hist. (1947) 1062; see also 93 Cong. Rec. 4363, 5005, A-2252, 2 Leg. Hist. (1947) 1172, 1479, 1524. Accordingly, it adopted Section 8(b) (3) and imposed upon unions "the same [obligation] as that imposed upon employers by section 8(a) (5)." S. Rep. No.

³ "Leg. Hist. (1917)" refers to the two-volume collection of the legislative history of the Taft-Hartley Act, entitled "Legislative History of the Labor Management Relations Act, 1947." The two similar volumes for the original Wagner Act are referred to as "Leg. Hist. (1935)."

105; 80th Cong., 1st Sess., p. 22, 1 Leg. Hist. (1947) 428. If the sole measure of the bargaining obligation were simply a sincere purpose and desire to reach agreement, there would have been little justification for the amendment other than textual symmetry. For, obviously, the principal business of a union is to negotiate agreements. Hence the amendment, if it is to be given substantive effect, must be treated as imposing on unions the broad obligation to bargain in a manner that comports with the integrity of collective bargaining process in the context of industrial realities.

B. The Board's ruling, forbidding disruptive on-the-job tactics like the ones in this case, which differ wholly from a strike in nature and effect, effectuates the statutory purposes

The court below reaffirmed its conclusion in the *Textile Workers* case (R. 154) that (1) except for specific types of strikes, Congress has not limited unions in their use of economic pressure to support lawful demands, and (2) for purposes of Section 8 (b) (3), no valid distinction can be drawn between the Union's disruptive tactics and a strike. But this reasoning overlooks the point, already noted (*supra*, pp. 17-20), that the Board is not confined in its implementation of the broad collective bargaining requirement to prohibiting conduct specifically forbidden elsewhere in the Act. It neglects, in addition, the important consideration that, as we demonstrate below (pp. 24-29), strikes and threatened strikes are ingredients of the collective bargaining Congress sought to foster, while tactics of the character here

in question have been aptly described as the "diseases of collective bargaining, not of its nature."¹ In other words, as we now show, both premises of the decision below are faulty in their interpretation of the Act and also in their undue constriction of the Board's functions thereunder.

1. In amending the Act in 1947, Congress specifically prohibited the use of some economic weapons by unions.² But the specification of these prohibitions cannot mean, as the court below apparently thought, that labor organizations were left free to exert any other form of economic pressure for purposes of collective bargaining. Congress could not "in the nature of things * * * catalogue all the devices and stratagems for circumventing the policies of the Act" or define "the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 194. This is particularly true of Section 8(b) (3) and its counterpart, Section 8(a) (5). The duty to bargain collectively is phrased in broad terms. It may be violated in a variety of ways not specified in the statute. In determining whether certain forms of economic pressure are compatible with the statutory obligation, the Board is

¹ S. Rep. under S. Res. 71, 82d Cong., 1st Sess., pp. 7, 9 (*Factors in Successful Collective Bargaining*), a report prepared by the Library of Congress for the Senate Subcommittee on Labor and Labor Management Relations.

² Secondary strike pressures, Section 8(b) (4) (A); jurisdictional dispute strikes, Section 8(b) (4) (D); strikes against Board certifications, Section 8(b) (4) (C).

not confined merely to drawing a line between what is specifically prohibited and what is not. The types of pressure which Congress specifically denied to unions—such as secondary boycotts and jurisdictional strikes, *supra*, fn. 5—may or may not occur in a context of bargaining negotiations. Congress outlawed these specific activities under all or any circumstances, whether they were employed as bargaining weapons or for other purposes. But the adoption of these specific prohibitions surely does not imply that Congress intended to leave labor organizations free to utilize all other forms of economic action for purposes of collective bargaining, no matter how much they might disrupt or impair the bargaining process the statute seeks to foster.

Section 7 of the Act accords a wide protection to concerted activities for purposes of collective bargaining. It does not, however, sanction all forms of concerted activity which, though not specifically prohibited, may nevertheless be viewed as “concerted activity” for purposes of “collective bargaining or other mutual aid or protection.” *National Labor Relations Board v. Electrical Workers*, 346 U.S. 464. Some forms of economic pressure are so out of harmony with the statutory policies that employees who engage in them lose the protection of the Act. The tactics to which the Union resorted here fall in that class and exposed the employees who participated in them to disciplinary action at the hands of their employer. The issue here, therefore, comes down to whether the Board is authorized under the Act to hold that such tactics, which the Act does not specifically

forbid but Section 7 does not protect, support a finding of a failure to bargain in good faith as required by Section 8(b)(3). If there is a reasonable basis for the Board to conclude that such tactics disrupt rather than facilitate the proper functioning of the collective bargaining process, we believe the Act does not preclude the Board from drawing from the use of such tactics the inference that there has been a failure to bargain "in good faith." We turn to that question.

2. The normal working of the collective bargaining process presupposes "cooperation in the give and take of personal conferences with a willingness to let ultimate decision follow a fair opportunity for the presentation of pertinent facts and arguments." *National Labor Relations Board v. Jacobs Mfg. Co.*, 196 F. 2d 680, 683 (C.A. 2). Cf. *National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149. But Congress also recognized, of course, that the collective bargaining mechanism cannot function in the absence of economic sanctions available to both parties. If one party to the negotiations is unable to support its proposals and resist the demands of the other by an effective threat of resort to economic power, it is evident that terms of employment will be established by fiat of the other, not through the bargaining process.

On the employer's side, economic power lies in his control of the business, for in the last analysis continued employment depends on the employees' acceptance of wages and conditions to which the employer

is agreeable. If the employees are unwilling to work on his terms he is free to replace them. On the union's side, the sanction behind its demand lies, in the main, in the employees' exercise of their unquestioned right to strike and withhold their labor. In the course of the bargaining process, each party weighs the cost against the advantage of each one of its alternatives. The main alternatives of the employer are to accept the union's best offer or to undergo a work stoppage. He must estimate the advantages and disadvantages of acceptance and compare them with the advantages and disadvantages of a strike. The union's main alternatives are accepting the employer's best offer or, if it persists in its demands, calling a strike and enlisting public support. The prospects of a strike thus play an important part in the negotiations. The employer weighs his proposals in terms of the union's willingness or ability to strike if an impasse is reached and the cost to him if a strike is called. The union, while it may resort to strike action, must also weigh its cost.

Thus, both sides operate with an acute awareness of how far they can go without bringing on a strike and of how much a strike would net them. Knowledge on both sides of the respective economic power of each, and an awareness of the cost involved in the exercise of that power, tempers the relationship and encourages each in good faith to resolve differences. In sum, the collective bargaining process envisages that management and representatives of the workers meet and discuss mutual problems with a view to

arriving at a meeting of the minds. Any problem not peaceably resolved must perforce be resolved through resort to the classic weapons available to the disputants. "Collective bargaining operates in that way."⁶ This was the "practice and procedure of collective bargaining" as worked out in the American industrial scene which the Act was intended to absorb.

Thus, as Senator Taft observed in a statement thrice quoted by this Court as an authoritative gloss on the Act, the right to strike is an essential element of free collective bargaining.⁷ Accordingly, the right to strike is expressly recognized by the Act and as a time-honored traditional weapon in the labor movement enjoys a distinctive legal status.

On the other hand, the harassing tactics used here—slowdowns, intermittent refusals to work, and other actions taken during working time and calculated to injure or disrupt the employer's business—

⁶ Taylor, Geo. W., *Government Regulation of Industrial Relations* (1948), pp. 53, 19-22; see also Daugherty and Parish, *The Labor Problems of American Society* (1952), pp. 502-503; Chamberlain, N.W., *Collective Bargaining Procedures* (1944), pp. 122-123; and *Collective Bargaining*, (1951), pp. 237-238; Smith, L. J., *Collective Bargaining* (1946), p. 208; Miller, G.W., *Problems of Labor* (1951), pp. 458-459; Warren & Bernstein, *Collective Bargaining* (1949), p. 27; Harbison, F. H., and Coleman, J. R., *Goals and Strategy in Collective Bargaining* (1951), p. 75; cf. Webb, Sidney & Beatrice, *Industrial Democracy* (1920), pp. 219-220.

⁷ 93 Cong. Rec. 3835, quoted in *Amalgamated Ass'n v. W.E.R.B.*, 340 U.S. 383, 395, n. 21; *U.A.W. v. O'Brien*, 339 U.S. 454, 457, n. 3; *National Labor Relations Board v. International Rice Milling Co.*, 341 U.S. 665, 673, n. 8.

stand on an entirely different basis, qualitatively as well as well as quantitatively. Such tactics are not a traditional weapon in the labor movement, they are not protected by the statute, and their availability is not essential to free collective bargaining. Indeed, they constitute "foul blows" and have been described as the "diseases of collective bargaining, not of its nature."⁸

Leaving aside the more general social disutility of organized soldiering on the job, such conduct tends to frustrate and defeat the give-and-take bargaining process Congress sought to incorporate and enforce under the Act. Disruptive economic sanctions like these, which may cost one party little or nothing in relation to the disadvantage imposed upon the other, are inconsistent with the collective bargaining process Congress had in mind.⁹ They do not facilitate agreement in a spirit of give and take because the party using them is under no substantial economic constraint to come to agreement except upon its own terms.

The tactics adopted by the Union here were calculated to inflict economic injury upon the Company without the normal burden upon the employees or the Union, which inevitably flows from a strike. Cf. *Automobile Workers v. Wisconsin Board*, 336 U.S. 245, 249-250. Indeed, the strategy followed here in

⁸ See n. 4, *supra*.

⁹ "Collective bargaining can function as a mechanism for pricing labor only if there is some bargaining power on each side." Cox, Archibald, *The Right to Engage in Concerted Activities*, 26 Ind. L. J. 319, 339.

a sense requires the employer to subsidize the employees who are unwilling to risk a strike and at the same time refuse to perform all of their duties as employees. From the Union's standpoint, of course, this is a highly desirable consequence. But it is not the consequence envisaged by the normal use of economic weapons in the course of collective bargaining. While a strike puts both parties under substantial economic constraint to come to agreement, the Union's conduct here was highly damaging to the Company,¹⁰ and obviously was far less burdensome to the employees than an ordinary strike, for that is the underlying reason prompting these on-the-job pressures (*supra*, p. 27). They continued to receive all of their normal compensation except commissions on new business which they were refusing to write.¹¹

The tactics utilized here are simply the counterpart, adapted to the insurance business, of the disruptive production line tactics employed in the *Automobile Workers* case, *supra*. Whether such tactics are resorted to in a factory or in an insurance office, their purpose and impact is substantially the same. From the employees' point of view, they are a "bet-

¹⁰ The drop in the company's volume of new business which the agents refused to write ran into millions of dollars (R. 129-138). In addition, the Company paid out large sums of money as compensation to staff managers who were left "high and dry" when the agents refused to work with them (R. 56) and also continued to pay salaries to a clerical staff "geared to handle" the normal volume of business (R. 57).

¹¹ The employees' partial loss of commissions is hardly to be compared with the total loss in pay involved in a strike.

ter weapon than a strike" because they simultaneously permit the employees to draw some, if not all, of their compensation, and disable the employer from making any dependable plans, in the case of a factory, with respect to production and delivery commitments, and, in the case of an insurance company, with respect to the orderly functioning of its business. In the case of a strike, "the company knows what it has to do and plans accordingly." *Automobile Workers, supra*, pp. 249-250. On the other hand, where the employees engage in on-the-job disruptive tactics, it is difficult for the employer to make any such plans to meet the exigencies created by the employees' refusal to perform all of their duties. Indeed, as in the instant case (see n. 10, *supra*), the employer may well be forced to continue to operate his business with its financial overhead as though it were functioning in its normal fashion, unless he discharges the offending employees and replaces them.

If such harassing tactics by employees are so repugnant to the "Act's declared purpose of promoting industrial peace and stability" (*National Labor Relations Board v. Electrical Workers*, 346 U.S. at p. 476) as to justify dismissal of the employees who participate in them, there is, we think, a reasonable basis for the Board to conclude that it would be incongruous to condone their use as a bargaining technique under the statute. Moreover, the use of slowdowns and similar disruptive on-the-job tactics as a lever for bargaining purposes has not been characteristic of the labor movement in this country.

"Despite their obvious effectiveness neither the slow-down nor similar practices have taken hold in the American labor movement, and there can be little doubt of the general public condemnation of occupying a job and taking pay while simultaneously refusing to perform the services required."¹² Such tactics can justifiably be condemned by the Board as a bargaining technique outside the bounds of "good faith." This is entirely in accord with the policy and provisions of a statute which "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Order of Railroad Telegraphers, supra*, 321 U.S. at p. 346.

In the final analysis, here as with many other issues arising under the Act, "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *National Labor Relations Board v. Truck Drivers, Local Union No. 449*, 353 U.S. 87, 96. Taking into account all of the foregoing considerations, we submit that the Board's judgment that the tactics utilized here are impermissible as a bargaining weapon not only squares with the collective bargaining process which the Act adopts but also strikes an appropriate balance between the interest of an employer in getting a full day's work

¹² Cox. Archibald, *op. cit.*, at p. 32.

from his employees as long as they choose to remain on his payroll, and the employees' interest in exerting economic pressure in support of their bargaining demands. The balance thus struck by the Board preserves to the employees their unquestioned, statutorily protected right to strike. At the same time it gives appropriate weight to the employer's interest in running his plant during the course of bargaining negotiations free from the disruptive tactics of employees who are unwilling either to strike or to perform the work for which they were hired.

3. It is no answer to say that the employer can force the employees who engage in activities like those involved here to go out on strike and thereby restore the normal balance of economic strength between himself and the union. While, as we have seen, strikes are an essential element of the statutory collective bargaining process, the legislative purpose of encouraging "the friendly adjustment of industrial disputes" (Section 1 of the Act) is hardly served by compelling the employer to force a strike in order to redress the economic balance. That would bring about the very obstruction to commerce which the Act was designed to prevent. To compel such a course of action on the employer would defeat the purpose of Congress in enacting Section 8(b)(3). While Congress reserved to the union the strike sanction as the ultimate weapon to enforce acceptance of its demands, the emphasis of the statute is on the practices and procedures conducive to the friendly adjustment of labor disputes. This purpose is not served where the employer is compelled to

discharge the employees and force the union out on strike and thereby disrupt the employment relationship. The legislative purpose was to promote industrial peace, not to encourage strife. It is more in keeping with this basic purpose of the Act to bar tactics like the ones in this case as a bargaining technique than to condone them merely because they may serve as the basis for discharge.

Congress, in enacting Section 8(b)(3), recognized that employers as well as unions are often anxious to enjoy the benefits and stability of collective bargaining agreements. In effect, it decided that the employer's traditional power to replace or dismiss employees for improper conduct does not adequately serve the Act's purpose to promote friendly adjustment of labor disputes. A construction of the statute which would leave the employer with the single alternative of dismissing employees who engage in bargaining tactics, which the Act does not protect as lawful concerted activity, would thus fail to give full effect to Section 8(b)(3). By imposing upon unions an affirmative statutory duty to bargain collectively in good faith, Congress sought to give greater stability to the bargaining relationship than had theretofore been achieved under the original Act. This purpose, as already stated, would be badly served if the employer could extricate himself from his dilemma, when the union resorts to harassing tactics, only by dismissing the employees and terminating the bargaining relationship. Moreover, to compel the employer to discharge his employees for engaging in such tactics or to submit to these very

serious handicaps while seeking to resolve his difference with the union inevitably tends to make the collective bargaining process a sterile procedure. If, as has been stated, "the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory,"¹³ an employer subjected to these tactics may often find that freedom illusory. For the Union's action takes on "more the character of coercion than of collective bargaining" (*National Labor Relations Board v. Electrical Workers*, 346 U.S. 464, 477).

4. It has been suggested that the Board's decision cannot be squared with Section 13 of the National Labor Relations Act and Section 501 of the Labor Management Relations Act, 1947. Section 13 declares that nothing in the statute, except as specifically provided therein, shall be construed to interfere with or impede or diminish in any way the right to strike. Section 501, in turn, defines the term "strike" to include "any concerted slow-down or other concerted interruption of operations by employees." It is urged that the statute itself thus equates slowdowns and other similar activity with strikes for purposes of Section 13 and hence are entitled to the statutory protection against the impairment of the right to strike. The short answer to this argument is that it was rejected by this Court in *Automobile Workers v. Wisconsin Board*, 336 U.S. 245, 260.

As that decision shows, the definition of the term "strike" in Section 501 was not intended to grant a

¹³ S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess., p. 12.

dispensation or protection for slowdowns or similar harassing tactics. A contrary interpretation makes "a fortress out of the dictionary" (*Cabell v. Markham*, 148 F. 2d 737, 739 (C.A. 2)) and is wholly at odds with the Congressional purpose. The legislative history of the 1947 amendments discloses that Congress was concerned over earlier decisions of the Board which it felt had sanctioned as permissible concerted activities certain kinds of work stoppages which were "undesirable." Congress noted with approval that the Board itself had more recently withheld statutory protection from some types of work stoppages¹⁴ and that the courts of appeals reviewing Board orders had "firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 38-39, 1 Leg. Hist. (1947) 542-543. And, as the Court noted in the *Automobile Workers* case, *supra*, at p. 260, the legislative record "indicates that, had the courts not made these interpretations, the Congress would have gone as far or farther in the direction of limiting the right to engage in concerted activities including the right to strike." Such being the temper of Congress, it is

¹⁴ Citing, *inter alia*, *American News Co.*, 55 NLRB 1302 (strike to compel an employer to violate wage stabilization laws held unprotected); *Scullin Steel Co.*, 65 NLRB 1291 (strike in violation of bargaining contract held unprotected); *Thompson Products*, 72 NLRB 886 (strike to compel employer to violate Act not protected).

inconceivable that the definition of the term "strike" in Section 501 of the Act—"read with the saving grace of common sense" (*Bell v. United States*, 349 U.S. 81, 83)—was intended to bring slowdowns and similar activities within the protection of Section 13. On the contrary, the more realistic and reasonable construction is that such activities as slowdowns and the like, which are not strikes in the conventional sense, were nevertheless included in the statutory definition not for the purpose of extending the protection of Section 13 to them but rather to bring them within the prohibitions and penalties against strike action contained in Sections 8(b)(4) and 8(d) of the amended National Labor Relations Act and Sections 303 and 305 of the Labor Management Relations Act.¹⁵

¹⁵ Insofar as this analysis that harassing tactics are not to be equated with traditional strike action rests upon the views expressed by the Court in *Automobile Workers*, it is not impaired by the Court's subsequent observation in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, that the "approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." The observation has reference to the Court's holding that when a question arises as to federal or state jurisdiction over labor activity within the regulatory area of the federal Act it is for the Board, and not the courts or other tribunals, to make the initial determination whether such activity is governed by Section 7 or 8 of the Act or is outside both of those sections.

However, insofar as the court below relied on *Automobile Workers* for its conclusion that the states have exclusive authority to deal with harassing tactics and that the Board may not therefore reach such conduct, the subsequent decisions of this Court would seem to have rendered that con-

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

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AUGUST 1959.

clusion untenable. *Automobile Workers v. Wisconsin Board*, 351 U.S. 266, 270-271, 274. *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656; *International Union, United Automobile Workers v. Russell*, 356 U.S. 634. Moreover, the circumstance that the particular conduct of one party or the other to the bargaining negotiations may be subject to state regulation cannot foreclose the Board from viewing that conduct, as it has done in this case, to determine whether the statutory obligation has been satisfied. An inquiry into the question whether the parties have discharged their obligation under the statute necessarily opens up for examination the entire range of the parties' relevant behavior and for this purpose it is immaterial whether such behavior may violate local law. Suppose, for example, that a union threatened an employer with bodily harm if he did not yield to its bargaining demands. The threat would be a violation of state law. Yet, it could hardly be supposed that, in determining whether the parties had bargained collectively in good faith as required by the Act, the Board could not consider the union's threats against the employer and find a violation of the statutory duty.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. 15

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO,
Respondent

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF FOR INSURANCE AGENTS'
INTERNATIONAL UNION, AFL-CIO**

QUESTIONS PRESENTED

1. Did Congress grant the Board any authority to find that a union was guilty of the unfair labor practice of refusing to bargain collectively, solely because the union directed picketing, slowdowns, interruptions of production and other activities considered "harassing" by the Board during a period of collective bargaining negotiations for the purpose of obtaining the employer's agreement to lawful contract terms?

2.

2. If the answer to the above question is in the affirmative, can such a Board finding be sustained in this case where the Board (a) did not consider the evidence showing that the Union had participated with reasonableness, an open mind and evident good faith in the bargaining itself, (b) held that it was unnecessary to show that the Union activities had any impact on the bargaining, (c) held that it was unnecessary to show that the Union activities had any impact on the Employer, (d) disregarded the fact that the Union had advised the Employer what concessions were necessary to terminate the activities, (e) disregarded the fact that the Union had advised the Employer in advance of these activities, (f) disregarded the fact that these employees do not work set hours and basically receive no compensation except commissions directly measured by services rendered, and (g) disregarded the real facts and created other "facts" by assumptions as to the bargaining position of the parties, the relative damage to them caused by the Union activities, and the purpose and effect of the Union activities as compared to a Board-recognized "strike"?

STATEMENT

I. The parties to the collective bargaining

In the bargaining involved in this case, the Insurance Agents' International Union (hereinafter called "Union" or "Respondent") was bargaining with The Prudential Insurance Company of America (hereinafter called "Company" or "Prudential"). Prudential is, and was throughout the 1956 events herein involved, one of the largest corporations in the United States. Its assets then were in excess of twelve and one half billion dollars (\$12,500,000,000). Resp. Exh.

2; Tr., 486.¹ Contrastingly, the Union was one of the smallest labor organizations in the United States. It had a total membership of approximately 12,500, of whom about 10,500 worked for Prudential. G.C. Exh. 8, Tr., 52-57, 67.

These parties had executed collective bargaining contracts in 1954 and 1952, covering Prudential's District Agents, in an extensive geographic unit comparable to that involved herein, which is a Coast-to-Coast unit covering 34 States and the District of Columbia. G.C. Exh. 25; Tr., 70-78. The Union had been an International Union since 1951 when it received its charter from the AFL; it had functioned previously as a Council of separate AFL Locals. In that form, it had executed a contract with Prudential covering a comparable unit in 1949. Previously, from 1942 or 1943, there had been a few contracts, covering a smaller unit, the larger unit being covered by a CIO Union.²

II. The employment involved

The employees governed by the bargaining in this case are Prudential District Agents. Their duties include servicing and selling the life and health and accident insurance issued by Prudential. Their special attribute as Prudential District Agents—debit agents—is the additional duty of regular collection of

¹ The complete Record is on file with the Clerk of the Court. References thereto will be as follows: "Resp. Exh." for Respondent's Exhibits, "G. C. Exh." for counsel for Board's General Counsel Exhibits, and "Tr." for transcript of hearing in proceeding before Trial Examiner. "R." will refer to the printed Record. Quotations throughout this Brief omit footnotes.

² For the bargaining history, see, e.g., *National Labor Relations Board v. Prudential Insurance Co.*, 6th Cir., 154 F. 2d 385; *The Prudential Insurance Company of America*, 106 NLRB 237, 81 NLRB 295, 80 NLRB 1583, 61 NLRB 1289.

the premiums due. The hallmark of the District Agent is that he is assigned a territory or "debit" of existing Prudential policyholders. He spends the bulk of his working time within the confines of his debit.

The Agents are required to report to their District Office, two mornings a week, Tuesday and Friday, at 8:30. They deposit their collections and may work on the many records and reports Prudential requires; in addition on Friday, there is a business meeting which consists generally of typical sales pep talks. These men are invariably out of the office by 9:30 on Tuesday morning and by 11 o'clock on Friday morning. R. 55-56.

Otherwise there are no fixed or regular working hours. As the Board's own witness testified, "The very nature of the job precludes setting a number of hours." R. 57. The individual Agent can determine when he will work, whether morning, afternoon or evening. Particularly with respect to sales, the Agent must meet the personal convenience and desires of the prospects. To the extent that his potential and actual clients work normal hours, the Agent must perforce himself work many hours in the evening and at other times not considered normal working hours. There is simply no support whatever, in either the general nature of the employment or the specific contents of this record, for any reference to "working time" such as that indulged in here by the Board. Bd. Br., 15, n. 1.

The Company asks for no reports regarding the number or timing of hours worked. Its only interest is in results. R. 56-58.

The emphasis on results is reflected in the compensation of these Agents. Their compensation is based on

"commissions" and incentive plans, as set forth in full in the 1954 agreement, General Counsel's Exhibit 25, under the headings noted at R. 61-62. These Agents received no compensation if no results were achieved—no collection commissions if nothing was collected; no sales commissions if nothing was sold. The sole exception was a "Special Allowance" in the amount of \$4.50 per week, R. 61-62, generally considered a partial reimbursement for actual expenses—primarily automobile expenses—inevitably incurred by these Agents in administering their debits.

III. The bargaining involved

It was stipulated that "appropriate letters and notices were exchanged between the parties opening up the contract for a new contract"; and that the bargaining was commenced on or about January 16, 1956. R. 40-41. This bargaining continued until agreement was reached on or about July 17, 1956. R. 41.

This bargaining was in large part recorded by an impartial court reporter. This entire record, "some 72 volumes of transcript of negotiations," R. 23, was admitted into evidence on the motion of Respondent, Resp. Exh. 1, Tr., 483. Excerpts are printed at R. 139-147.

By the time the contract expired on March 18, 1956, the parties had engaged in extensive negotiations, Resp. Exh. 1A, 1-1PP, 35-39. By this time, the parties had changed their positions to some extent. With relatively few exceptions, however, the adjustments which produced agreement had been made by the Union. R. 139-142, 144-147.

After the expiration of the contract on March 18, the conduct of the negotiations themselves did not change.

Compare Resp. Exh. 1A, 1-1PP; 3539, with 1QQ, 3540-1TTT, 5251; and compare Resp. Exh. 1UUU, Pars. 1-7 with Pars. 8-20 (excerpts at R. 147-153). Tr. 482-483, 487-488, R. 7.

Throughout the period after March 18, the negotiations centered on a single issue, the Company's demand for new contract language regarding its control over debits. The Company conceded its demand was not made because of any practical need or problem. While it was willing to give general assurances that it had no intention of changing its past methods of operation, and that it would not be hasty, arbitrary or unfair,³ it would not answer specifically questions about its future intentions.⁴ Further, the Company was most reluctant to put any of its verbal assurances into the written contract. Cf. the requirement of writing in Section 8(d) of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. §§ 141 et seq. (hereinafter referred to as "the Act" or "Taft-Hartley"). And the Company insisted that the union should have no recourse through the grievance procedure, whatever happened, and no matter how an Agent was deprived of a part of his debit, and whatever the consequent loss of opportunity for sales and collection commissions. See, e.g., R. 147-153; Resp. Exh. 1UUU, Pars. 1 and 7. The Company rejected proposals agreeing to the right demanded by the Company, if exercised "in a manner that is not arbitrary or unreasonable," R. 148, or "in a just and equitable manner," R. 152.

³ See, e.g., Resp. Exh. 1MM, 3233, 3256; 1UT, 3814; 1WW, 3876-3878, 3889, 3896-3897; 1BBB, 4184-4186; 1HHH, 4588-4589; 1NNN, 4987.

⁴ See, e.g., Resp. Exh. 1BBB, 4177 et seq.

Agreement was ultimately reached, however, largely on the basis of movement by the Union. R. 153; Resp. Exh. 1UUU. To achieve agreement, the Union receded from its original positions, and accepted a debit clause which incorporated into the written contract a few of the Company assurances made on the record, but which provided no procedure for review of even obviously arbitrary action by the Company in cutting debits.

IV. The "work without a contract" program

Until March 18, 1956, the 1954 contract between the parties was in effect; it contained the following no-strike clause:

"Article XXIX—Lockouts, Strikes and Stoppages

1. During the period of this Agreement the Employer will not lock out any Agents.

2. During the period of this Agreement the Union will not cause or permit its members to cause, nor will any member of the Union take part in any sit-down or stay-in in any of the Employer's offices.

3. During the period of this Agreement the Union will not cause or permit its members to cause, nor will any member of the Union take part in any strike, stoppage, mass late reporting, mass blank production weeks, or slow down of duties or production, or picket any of the Employer's offices, for any reasons whatsoever; nor will the Union or its members engage or participate in any demonstration, display, publication, or advertisement, tending to incite sympathy or protests concerning the relations between the Employer and the Union and the Agents. The term 'strike' shall include a strike of any nature, including such as are termed

'sympathetic,' as well as any cessation or reduction of normal business activities, or efforts by a group of Agents for the purpose of coercing the employer." R. 62-63.

There is no allegation of violation of this contract. There were no "harassing" activities while such activities were proscribed by contractual agreement.

Effective upon the expiration of the contract, the Union directed its members to engage in certain activities, called the "work without a contract program", as set forth in letters sent by the International President to the membership and the local leadership, on about a weekly basis. Certain activities were continued throughout the period from March 19 through June 22, 1956; others were continued only during part of that period or on a one-shot basis. The activities may be summarized under the headings of (1) picketing, leaflets and petitions; (2) not writing new business; (3) late reporting; and (4) continuing and intensifying previously existing Union policies on Company sales and promotional campaigns.

1. The Union expressed its views on the negotiations and appealed for public support by picketing, distributing leaflets and asking Prudential policyholders to sign petitions. The picketing, consisting of distribution of leaflets as well as carrying of placards, was directed to occur at the following times and places.

(a) During the noon hour (from noon to one o'clock) on Wednesdays at the local (district and detached) Prudential offices, through May 2, 1956;

(b) During the noon hour on Fridays, and from 10 a.m. to 11 a.m. on Tuesdays, at the local offices, from Friday, April 6, 1956, through Friday, May 4, 1956;

and thereafter, from 8:30 to 9:30 in the morning on Tuesdays and Fridays;

(c) On Fridays, during the noon hour in front of the Chicago Regional office; also picketing of the Newark Home office on March 23, 1956, from 3:00 p.m. to 4:00 p.m., and on April 27, 1956, from 2:00 p.m. to 4:15 p.m.; and of the Los Angeles Regional office during the noon hours on April 6 and 27, 1956, and from 1:15 p.m. to 2:05 p.m. on April 20. See G.C. Exhs. 54-56; Tr., 165-172, 176-183.

In other words, there was picketing of local offices for an hour, mostly a lunch hour, for three days a week, during most of this period; and an additional, occasional afternoon hour at a different place in three cities.

The picketing placards and the leaflets used such statements or slogans as: "Prudential Insurance Company of America Refuses A Satisfactory Contract To Its Agents"; "Prudential Advertises Security for All but denies Security to its Agents"; and "We Have Been Working Without A Contract Since March 18th And The Prudential Is Determined That We shall Not Have A Contract Other Than On Their Terms." R. 112-114, 42-43, 105.

Throughout this period, the Agents sought the support of their policyholders, primarily through soliciting signatures on petitions. These petitions read as follows:

"To Mr. Carrol Shanks, President
The Prudential Insurance Company of America
Home Office
Newark, New Jersey

As a policyholder in the Prudential Insurance Company of America, a mutual company, I want you to negotiate a contract with the Insurance Agents' International Union, AFL-CIO which will provide fair and favorable working conditions which will guarantee my Agent's job security. As the executive officer of my company, I petition you not to create a situation which will deprive me of my Agent's friendly service and wise council.

Policyholder

Policy Number"

R. 81.113

2. Until May 7, 1956 the Agents were directed not to write any new business.⁵

3. On Tuesday, March 27, the Agents were directed to report not before 10 in the morning, remain until noon and then depart in a group. R. 71. This was repeated the following week. R. 76. Thereafter, there

⁵ There is no basis in the record for the finding at R. 29 and the assertion at Bd. Br., 5, that the Union—i.e., the International which alone was party respondent in this case—disregarded Company instructions once the writing of new business was resumed. The only evidence of record is one letter by one Local. R. 107-108. To cite actions of the Locals is arbitrary and unreasonable, when no Local is party to the case or to the contract or has any role in the administration of the contract; and when there was no proof and no stipulation that the International was in any way responsible or accountable for Local actions in this regard. The International's instruction was to "all Agents to resume their normal activities on the debit, selling and servicing business. G. C. Exh. 33EE, 2 (emphasis added only to "normal").

was no late reporting, R. 85, 89, 91-92, until May 8, when the picketing on the two report days was transferred from the noon hour to the 8:30-9:30 a.m. hour, and the Agents reported at 9:30. R. 100-102; 44.C. Exh. 54.

4. While the above were devised for the purpose and during the period of the 1956 negotiations, and were not otherwise instituted or operative, the Union's positions on "all-go-or-none-go" to Prudential business conferences and on "May Policyholders' Month" and other special Prudential "Months" antedated the negotiations and were independent of them. The former was contained in a Resolution passed at the regular Biennial Convention of the Union, back in May, 1955. R. 63. The latter was consistent Union policy towards these regular Prudential "Anniversary" Months. In other words, these activities were only continuations of previously existing Union policies; they were not created or followed for purposes of the 1956 negotiations.

V. The hearing before the Trial Examiner: the position of Counsel for the Board

When the "work without a contract program" was begun, upon the expiration of the contract, on March 19, 1956, the applicable law was stated in *Textile Workers Union v. National Labor Relations Board*, 97 U.S. App. D.C. 35, 227 F. 2d 409 (hereinafter referred to as "*Textile Workers*"), the only judicial expression in point, which *rejected the Board's position advanced again here*, and clearly and expressly held that such activities could not be evidence of an unfair labor practice. The Board had applied to this Court to review the case.

On April 2, 1956, the Board's petition for a writ of certiorari was granted. 350 U.S. 1004. (This order was vacated and the writ denied, on October 15, 1956, 352 U.S. 864.) On April 9, 1956, the Company filed its charge against the Union.

On June 5, 1956, the Board issued a complaint against the Union (R. 1); and the case went to hearing before Trial Examiner C. W. Whittenmore, on June 27, July 23-26, and September 10-11, 1956.

At the hearing, the prosecution's case consisted primarily of documents admitted by stipulation; there was also one witness. Some of the documents were offered to establish that the Respondent had initiated these activities, and that it and its Locals had endeavored to carry them out successfully. G.C. Exhs. 33-53; excerpts appear at R. 61-114. Others purported to show the number of petitions received, and the change in the volume of new business during this period. G.C. Exhs. 54-60; excerpts appear at R. 115-138. All the Exhibits were admitted subject to a continuing objection as to relevancy and materiality. R. 18, 40, 51-53. The witness, a Company Vice President, gave general descriptions of the industry and the duties of these employees. Tr. 276-356.

Counsel appearing for the Board's General Counsel (hereinafter referred to as "counsel for the Board") introduced no evidence on each of the following:

1. The actual course of negotiations.

Indeed, counsel for the Board conceded that "on its face the bargaining engaged in by the Union and the Company at the bargaining table might seem to be a free and good faith give-and-take type of bargaining". R. 55.

2. The actual impact of the Union's activities on the employer.

Counsel for the Board expressly stated and reiterated that the Exhibits as to what took place during this period (Exhibits 54-60 referred to above) were solely to establish that the directives of the Union were implemented to some extent by employee conduct. The Exhibits were not introduced to show the economic impact on the Company. Counsel for the Board at that stage was quite explicit; he said, "I have studiously avoided the use of the word 'effected,' because I'm not using these figures to show the effect. I am using them for the purpose of showing the extent of participation rather than the effect of participation." R. 45. See also 48-51, 18, 20. In other words, the Board expressly disclaimed offering any evidence to prove that the Company had actually been disrupted or damaged to any extent.

3. The availability or unavailability to the Union of any "effective threat of resort to economic power," Bd. Br., 24, other than the "harassing tactics" utilized, in this particular negotiations, or in any theoretical negotiations, or generally to agents' unions in the insurance industry.

4. The relative bargaining power of this Company and this Union in this or any other negotiations; or of employers and unions in the insurance industry generally; or how either compares to any other industrial relations situation.

5. The loss of income to the individual employees involved, and to the Union, potentially and actually involved in the utilization of these tactics.

6. Any proofs on the "fairness" or "unfairness" of these tactics, either in this particular bargaining, or generally between these parties, in the insurance industry or in the American economy. There was no expert testimony, live or documentary, or any other evidence proffered as to this subject or any of the following.

7. Whether any of the tactics used here, or any activity which is, has been or will be "harassing" in the Board view, is "classic", "traditional", "appropriate" or any other adjective or concept. This subject was not mentioned.

8. "The philosophy of bargaining as worked out in the labor movement in the United States." This also was not mentioned.

9. The "diseases of collective bargaining." Again, this subject was not mentioned.

10. Any proofs as to whether these tactics were distinguishable from a completely effective strike, either in this particular bargaining, or generally between these parties, or in the insurance industry, or in the American economy.

It bears reiteration that the foregoing is a list of subjects on which counsel for the Board introduced *no* evidence at the hearing.

At the hearing, the theory of the Board was that the intent to influence negotiations was the evil ingredient diffusing illegality over the bargaining performance of the Union. Typical statements of Board counsel were that proof was made "that these activities were engaged in at a time when the respondent was engaged in the negotiations with Prudential for

a collective bargaining agreement covering employees who were participating in those activities or who were expected to participate in these activities.

* * * * *

"It is clear from the documents in the record that the program and the activities which we have described were not engaged in isolation, but were geared to the fact that the negotiations were going on between Prudential and respondent. It is established in the record that the intent and purpose of these activities was to bring some pressure upon Prudential so that * * * respondent would be in a position of securing a favorable position at the bargaining table and that Prudential would be put in a weaker position as far as the give and take at the bargaining table is concerned." R. 54.

The theory of the prosecution was never made clear at the hearing. Counsel for the Board was most reluctant to state any theory. When the attempt was made, it consisted largely of references to the reversed Board decision in *Textile Workers, supra*, and conclusory statements tantamount to the position that a union's engaging in any pressure activities other than a completely effective strike, for the purpose of influencing collective bargaining negotiations which are being carried on at the same time, are, *per se*, a violation of Section 8 (b) (3).

The Union insisted that there was no basis in law or in fact for any such charges. In addition to timely motions to dismiss, declaring that the Board first had not stated and then had not proved any statutory violation, the Union established, by the negotiations record, that it had bargained in good faith.

VI. The Trial Examiner's Intermediate Report

The Trial Examiner recommended that the complaint be dismissed in its entirety. R. 6-26. He held in effect that there was no discernible difference between "harassing" activities and a strike, as evidence of failure to bargain in good faith — both have the identical design to bring pressure on the employer during negotiations.

"Was the bringing of pressure upon the employer at the bargaining table by action of employees in the field illegal? General Counsel does not so claim. In effect he concedes that such pressure, if brought by a full strike, would be permissible and that action causing it would be fully protected by the Act." R. 16-17.

As "to the apparent theory of General Counsel that half a strike is greater than the whole strike, and, when indulged in during negotiations, must be presumed to exert such unique pressure upon the employer that the Board should find it illegal," the Trial Examiner held as follows:

"First, it should be noted that neither General Counsel nor counsel for Prudential offered any evidence, oral or by document, objective or subjective, to indicate that the 'harassing tactics' of a slowdown had *any* effect upon negotiations or upon the bargaining faculties of the employer's negotiators. * * * It may well be that the Board will be able to 'objectively evaluate' the 'impact' of activities upon 'collective bargaining negotiations' from the mere 'nature of the activities,' but the Trial Examiner is reluctant even to attempt this feat of mental polevaulting with only presumption as a pole. The analogy of coercive statements seems not in point. A threat is a threat, and forbidden by law. A slowdown, whether de-

signed to effect collective bargaining or not, is *not* forbidden by law. On the contrary, appraising a slowdown as a partial strike or a 'method' of striking, as noted in the preceding section, the Supreme Court has pointed out that the Board is empowered to 'forbid a strike' or 'its method' *only* 'when and because its purpose is one that the Federal Act made illegal.' " R. 17-18, 18-19 (emphasis in original).

In the Board's *Textile Workers* decision, the Trial Examiner noted, there was reliance on the "strong economic pressure" which had in fact been imposed on the employer, and on the failure of the Union to notify the employer of its specific demands, or give the employer advance notice of its activities. R. 20. In the instant case, the Trial Examiner found that the General Counsel had expressly disclaimed any effort to prove the nature of the losses, if any, sustained by the Company. *Ibid.* Further, he found as undeniable or stipulated facts that "the employer was at all times well informed as to the 'specific demands which these tactics were designed to enforce' and 'what concessions it could make to avoid them.' * * * [and] that the employer was aware of all directives of the Union concerning planned and prospective activities, *before* their effective date. In no respect may it be found that the employer here was 'harassed' by the element of surprise depriving it of opportunity to take appropriate counter measures." R. 20-21 (emphasis in original).

The actual negotiations, the Trial Examiner found, were admittedly conducted in good faith, on a give-and-take basis. R. 19. The Union satisfied the requirements of the statutory definition of collective bargaining, Section 8 (d). "So far as the record

shows," he found, "each party met with the other when requested, conferred in good faith, negotiated an agreement and signed it." R. 24.

The Trial Examiner did not confine himself to the prosecution side of the case, but also examined the affirmative defense presented by the Union. He considered the evidence as to the actual course of bargaining, rejecting the notion that it was "so remote a circumstance of bargaining that it must be ignored." R. 25.

Upon reviewing the actual course of the bargaining, the Trial Examiner found as a fact that "From the 'circumstantial evidence' of the bargaining itself it appears that but one inference is possible, particularly in view of General Counsel's concession noted heretofore: the Union's motive was one of good faith." R. 25.

The net conclusion of the Intermediate Report was as follows:

"In summary, having given full consideration to the unprotected activities as evidence bearing upon the ultimate question of bad faith bargaining, the Trial Examiner concludes and finds, because of their isolation in the light and weight of all other evidence, including stipulations and concessions noted above, which clearly establishes good faith bargaining, that General Counsel's complaint is not sustained by the preponderance of evidence." R. 26.

VII. The Decision of the Board

Over a year after the Intermediate Report was filed, the Board issued its decision reversing the Trial Examiner. R. 27-37. The Board concluded that the Union "by engaging in harassing conduct during the

course of the negotiations, failed to bargain in good faith and thereby violated Section 8 (b) (3) of the Act." R. 32.

Solely from the fact that these activities had been engaged in during negotiations, the Board concluded that the Union had "clearly revealed an unwillingness to submit its demands to the consideration of the bargaining table", had "reflected an attitude not to engage in the free give-and-take of good faith bargaining" and had "impaired the process of collective bargaining." R. 30-31.

The process of collective bargaining, according to the Board decision, must be where reason is the exclusive governor; any resort to economic power would violate pure reason. The Board's initial characterization was that the Union's conduct was "the antithesis of reasoned discussion it was duty-bound to follow. Indeed, it clearly revealed an unwillingness to submit its demands to the consideration of the bargaining table where argument, persuasion and the free interchange of ideas could take place." R. 30. What "is essential to good faith bargaining", the Board held, is "an open and fair mind to reach agreement on the basis of free exchange of ideas," and presumably nothing else. *Ibid.* Citing only itself for authority, the Board said that good faith bargaining requires "reasoned discussion in a background of balanced bargaining relations * * *." R. 31.

The Board relied on its own decision in the *Textile Workers* case, R. 31, 32, n. 13; but made no analysis of the facts and circumstances of that case, and gave no mention to the fundamental distinctions between that case and this.

The Board attempted to distinguish the Union activities it denominated "harassing" from its version of a "strike" by stating that individual employees were not engaging in "protected" activities when they were engaging in these activities. R. 31-32. It declared that these activities were an effort by the employees to change their working conditions unilaterally and thus were incompatible with free collective bargaining. *Ibid.*

The Board held that "*it is unnecessary to show, as the respondent urges, that this conduct actually affected the negotiations or the Company's business.*" R. 30 (emphasis added).

The Board ordered the Union to cease and desist from any of the activities, and from "harassing activities or other unprotected conduct, * * * for the purpose of forcing the Company to accept its bargaining demands, or from engaging in any like or related conduct in derogation of its statutory duty to bargain * * *." R. 34-35. And the Board ordered the posting of notices to this effect throughout the Company offices and the meeting halls of any of its Locals which administer the contract with Prudential. R. 35-37.

SUMMARY OF ARGUMENT

I

The power which the Board asks the Court to underwrite in this case has no cognizable boundaries. The only justifications given for the decision are generalities which apply to complete strikes as well as to partial strikes, and impose no limitation on the Board's discretion. In its decision, for example, the Board relied on the "antithesis" between less-than-complete strike activities and "reasoned discussion." But such

an antithesis exists between reason and any use of economic pressures, including the complete strike which the Board purports to recognize.

In its Brief the Board abandons this ground and relies exclusively on generalities. The Brief offers no justification for the Board Order other than calling the Union activities such names as "foul blows", "diseases of collective bargaining" and repugnant to "the philosophy of bargaining as worked out in the labor movement in the United States." There is nothing in the record on any of these subjects. No evidence was even offered on any of them. These concepts obviously express rather than explain decision. They are inherently incapable of precise definition. They are so vague and all-encompassing that their only effect is to enable the Board to do whatever it desires to do. If the Board can take action on the basis of such judgments, it can literally do anything in the field of collective bargaining. It can determine the result in any particular bargaining by dictating the tactics which may be used.

The Board disregarded the plain words of the statute in this case. It flouted the statutory protection of the right to strike. It disregarded the Congressional intention and expression in the refusal to bargain section, as well as the provision defining collective bargaining. It outlawed conduct which Congress decided not to prohibit.

The Board now puts forth readings of the statute flatly contrary to those which it advised this Court were authoritative in 1949. The facts as to the legislative history and Congressional language have not changed. Only the Board attitude towards its function has been altered.

II

"A. This Board Order, enjoining the use of slowdowns and similar activities during bargaining, is expressly prohibited by the Act. Section 13 safeguards from Board interference or diminution "the right to strike", "except as specifically provided for herein". There is no specific qualification or limitation of the right to strike in Section 8(b)(3), the only provision relied on by the Board. Section 501(2) defines "strike" as expressly including "any concerted slow-down or other concerted interruption of operations by employees"; and undoubtedly covers Respondent's activities.

"The Board argues that Section 501 must be applied exclusively to penalize or prohibit Union activity. There is no support in the legislative text or history for any such truncated and discriminatory reading. As the decisions of this Court as well as the plain statutory language demonstrate, the right to strike is protected from Board interference, under whatever statutory provision the Board claims to be operating.

B. *Auto. Workers v. Wis. Board*, 336 U.S. 245, definitively holds that such activities as Respondent engaged in are *not* subject to Board regulation or prohibition. That decision has been cited approvingly many times and remains good law. By upholding a third category of union activity—"neither protected nor prohibited," under the Federal Act—that decision demolishes one of the basic assumptions of the Board, i.e., that any activity can be prohibited simply because it is not protected.

III

This Board Order is not authorized by the Act. This is established by many different provisions of the Act.

A. 1. a. The distinction between the "process" of collective bargaining and bargaining "powers" is pertinent to an understanding of the parties' position in this case. The Board confuses the two in endeavoring to find some authority to regulate union bargaining *powers* under a statutory provision requiring the union only to participate in the bargaining *process*.

Prior to Federal legislation safeguarding the bargaining process, Unions and employers in effect defined both the process and the powers for themselves. Unions did whatever was necessary to equalize their strength with that of the employer. Contrary to the assertion of the Board, less-than-complete strike tactics were completely "classic", "traditional" and acceptable. The authorities the Board cites purporting to show that the complete strike was labor's *only* weapon in fact say no such thing, and say no more than that such a strike was labor's *maximum* weapon.

The Congressional legislation, as this Court's discussion of collective bargaining shows, extended only to protection of the "process"—to insuring that the employer would recognize the Union as the collective (as opposed to individual) bargaining representative, and would try in good faith to reach written agreement. The "philosophy of bargaining" means no more than this.

b. The employer's obligation to bargain, in Section 8(5) of the Wagner Act, extended no further than this same concept of participation in the bargaining "process". So long as the employer did nothing to

undermine the collective bargaining representative and sought in good faith to achieve written agreement, he had fulfilled his duties. There was no restriction on any union bargaining powers.

c. The legislative history of Section 8(b)(3) of Taft-Hartley shows that its only purpose was to achieve mutuality of treatment of the two sides, by textual symmetry. The only purpose was to impose the same duty on unions as had been imposed upon employers by 8(5) of Wagner and was being imposed on employers in 8(a)(5) of the Act. In the Congressional debates, the only specific example of union conduct which would violate 8(b)(3) was so-called "take it or leave it" bargaining. In this case, there admittedly was no such bargaining.

There is no justification in the legislative language or history for the Board's assertion that there was any authority given—and, *a fortiori*, any broad, comprehensive authority—over union bargaining powers.

(2. The issue of whether an activity is "protected" under Section 7 for the purpose of reinstatement rights for individual employees is irrelevant to the instant issue of whether the Board may prohibit Union activity. The Union and the individual employees have different legal rights. It is not true that any activity which is not "protected" from the viewpoint of individual reinstatement rights may be "prohibited" by the Board from the viewpoint of Union bargaining powers. The conduct involved in *Labor Board v. Electrical Workers*, 346 U.S. 464, is completely different from the activity involved herein. That conduct was held not addressed to the purposes envisaged by the statute. Here, the conduct was condemned precisely

because the conduct was aimed at obtaining contract terms which were completely legal under the Act.

B. Congress defined the obligation to bargain collectively in Section 8(d). Respondent fulfilled the terms of that definition. This Section was not intended to give the Board any broad powers. It was, rather, intended to limit the Board power in refusal to bargain cases, as well as specifically to limit Union's right to strike by requiring certain advance notices. As collective bargaining was defined by Congress and decisions of this Court, Respondent did not refuse to bargain collectively; and the Board lacked authority to find that it had.

C. Congress specified the particular Union activities which it desired to prohibit in Section 8(b)(4), because of their purpose. Admittedly, Respondent's tactics were not for any of the Congressionally condemned purposes but for the purpose of achieving lawful agreement. This Court has held that the prohibition by Congress of certain union conduct was a deliberate legislative choice that unions could utilize all other types of economic pressure and bargaining power.

D. Although Section 8(c) of the Act provides that the expression of views "shall not constitute or be evidence of unfair labor practice" if they contain no threats or promises, the Board is seeking to enjoin such activities. Picketing, the distribution of leaflets and other expression-of-opinion activities were indiscriminately grouped under the single heading, "harassing tactics", with which the Board condemned all the Union activities.

E. In any event, the Order puts upon Respondent the burden of determining what is illegal, by enjoining "unprotected activity" and all activity "in derogation of (Respondent's) statutory duty to bargain". This, plus the ordering of affirmative relief, exceeds the bounds which have been established by this Court on the scope of Board Orders.

IV

A. The Board is enforcing general, legislative policy in this case, not adjudicating a particular case. The Board's Order has no basis in the record other than the Union's using less-than-complete strike activities during the period of collective bargaining. There was absolutely no other fact whatsoever supporting the Board decision. The decision was thus a *per se* decision, eschewing consideration of the entire record.

B. In addition to not finding any basis in the record for its decision the Board disregarded or assumed away many of the actual circumstances of this case. Specifically, these circumstances were as follows:

1. In this case, advance knowledge was given the employer of the Union activities. In the Board's *Textile Workers* opinion, as well as *Auto. Workers v. Wis. Board, supra*, the lack of advance knowledge, the surprise, the inability of the employer to plan accordingly, was cited as one of the prime bases for regarding the activity as "unprotected".

2. The Board assumed that there was relatively little economic harm to the Union and the individual employees involved, when the fact is that these employees are on a commission system, and suffered immediate economic damage to the extent that they did not perform their duties.

3. The Board decision stated the impact on the employer was irrelevant, while the Board Brief assumes that the damage done to the employer was substantial. The fact is that all the operations of the employer, except the sale of new business, proceeded normally; and Prudential obviously preferred this to a complete strike situation.

4. The parties to this bargaining—a financial colossus and a relatively small union—did not enjoy parity of bargaining power, as the Board evidently assumed.

5. In this industry, which is not manufacturing, there is need for less-than-complete strike tactics for equalizing bargaining power. Complete strikes are relatively more vulnerable, in terms of continuing income to the employer, than in industry generally.

6. The parties recognized that such tactics were necessary in this industry, by including partial as well as complete activities in the "no strike" clause of their contracts. They intended that the Union would be free to use these activities when there was no contract in effect, which was the only time when they were utilized.

7. The Board refused to consider the bargaining record which the Union introduced as demonstrating that it had bargained in good faith, and held that there was no need to show any impact on bargaining. It merely presumed that these Union activities impaired the process of bargaining. The Board's case boils down to saying that there could not have been good faith bargaining in theory even though there was in fact.

8. This Court has instructed the Board to adjudicate refusal to bargain cases on their particular facts, and not to decide them on any such *per se* basis as applied

in this case. The Labor Board as well as other administrative agencies have been reversed by this Court when they exceeded the powers granted by their statutes or lacked the minimum quantity and quality of evidence and reason to sustain their actions.

ARGUMENT

I. THE JUSTIFICATIONS TENDERED BY THE BOARD IN THIS CASE AMOUNT TO NO LESS THAN CLAIMS FOR UNLIMITED ADMINISTRATIVE FIAT OVER COLLECTIVE BARGAINING

The issue in this case is whether there is any area of freedom of choice left to the parties themselves in collective bargaining; or whether the National Labor Relations Board has plenary jurisdiction to enforce whatever it elects to regard as ideal collective bargaining. To accept any of the Board arguments in this case—either those in the decision itself or the different ones proffered in the Brief in this Court—is to approve any action, without any comprehensible limitation whatever, which the Board wants to take in the area of collective bargaining.

The essence of the Board position in this case is its generality. The Board Brief ultimately rests on phrases such as "impairs the process of collective bargaining", "effectuates the statutory purposes" and "philosophy of bargaining", as well as "diseases of collective bargaining," "foul blows" and "unfair". These phrases are at once undefined and indefinable. They express the desire of the Board to prohibit union conduct but they do not suggest any basis for the authority of the Board to implement its subjective reactions. Nor do they contain the aggressive assertions of Board power within any comprehensible limits.

The Board fancies itself in the role of omniscient, omnipotent specialist consultant to collective bargaining, diagnosing and curing the "diseases of collective bargaining." The Board presumes that the Act is its license to practice throughout the entire area of collective bargaining. It asks this Court to underwrite its freedom to introduce and administer whatever collective bargaining nostrums it concocts, even to the point of attempting unauthorized surgery to remove whatever faculties and powers of any party it deems harmful, however unreasonable and anomalous its justifications may be.

The Board is actually attempting to restrict drastically the area of free, voluntary choice, for example, while it claims to be prescribing for the health of free collective bargaining. Under the Board's wishes, each side involved in the bargaining process will have its freedom of choice bureaucratically curtailed. The union, which previously had a wide choice of lawful weapons and pressures, may be deprived of all the weapons it considers effective in a particular situation, and be restricted to an all-or-none choice, either all out strike or no economic pressure at all. The employer is to be subjected to the risk of incurring an inevitably complete strike, and be deprived of the opportunity of continuing to operate under the partial strike—the very choice which the employer in fact made in this case. By thus restricting the choices of both parties the Board itself asserts a powerful if not the decisive voice in determining which side shall be victor—and this is done in the name of free collective bargaining.

For the avowed purpose of avoiding industrial disputes, the Board demands that partial disputes be expanded into complete disputes. To the Board, a

partial interruption of production is evidently a more serious blow to the gross national product than complete cessation of production. While labor relations history and philosophy treat the complete strike as labor's maximum weapon, the Board seeks to enforce it as the only legal union weapon. In the name of resolving industrial disputes without resort to economic force, the Board demands that any economic battle must be turned into total industrial conflict.

To justify such anomalous results, the Board necessarily assumes it has complete and unlimited jurisdiction over the conduct of the parties during collective bargaining. Its fundamental premise is that nothing was withdrawn from its administrative grasp. It has a judgment to pass on all union activities—either “protected” or “prohibited”. To the Board there is no middle ground. There is nothing reserved to the States. There is no area of collective bargaining where private parties can make their own voluntary choices, secure in the knowledge that the Board cannot brand their decisions and actions as unlawful.

To justify such an extreme position the Board must go to extreme lengths. One illustration, meriting fuller discussion at this point because Respondent believes it symptomatic of the Board's approach to this case, is the use of the “diseases” terminology. The Board states that slowdowns and similar activities “have been described as the ‘diseases of collective bargaining, not of its nature.’” Bd. Br., 27. Earlier, the Brief had criticized the *Textile Workers* decision of the Court below for neglecting “the important consideration that * * * tactics of the character here in question have been aptly described as the ‘diseases of collective bargaining, not of its nature.’” *Id.* at 21-22. Much

light is shed on the Board's approach in this case by a brief discussion of the history of this quotation, and its actual context and meaning.

At the time that the Court below decided *Textile Workers*, it did not have before it any assertion that slowdowns and similar activities were "diseases of collective bargaining, not of its nature." The Board did not rely on this quotation until it submitted its Brief to this Court in *Textile Workers*. At that time, the Board cited the quotation as "authoritatively" giving the judgment of the Senate Subcommittee. No. 35, October Term, 1956, Bd. Br., 21, 27-29. It is not true that this was a Subcommittee statement; as the Board correctly noted in its Brief in the Court below in this case, this was a study paper which "did not commit the subcommittee or any individual Senator to its views." D.C. Cir., No. 14,262, Bd. Br., 19, n. 9. Even if it were a Subcommittee report, a 1954 report could not provide guidance to the Congressional intention in Taft-Hartley, *a fortiori*, since "a 1948 committee report is no part of the legislative history of [this] statute enacted in 1947." *Labor Board v. Lion Oil Co.*, 352 U.S. 282, 291 (emphasis added).

The particular context of this quotation follows:

"The complete contract embodies the standards and principles upon which it is agreed that work will be conducted in the plant. The obligation of the employer to abide by these terms is enforced by shop stewards and union representatives, by formal and informal machinery for handling complaints and grievances. If the machinery for enforcing the agreement is written into it and a method of final determination of grievances under it is provided, work stoppages *during the life of the agreement are violations of the intent and*

purpose of the collective agreement. On-the-job pressures, such as slow-downs, quickies, disruptive Union meetings during working time are diseases of collective bargaining, not of its nature." Peek, G. *Factors In Successful Collective Bargaining*, Staff Report for the Subcommittee on Labor and Labor-Management Relations of the Senate Labor and Public Welfare Committee, 82d Cong., 1st Sess. 9 (1951) (emphasis added).

The particular context, unambiguously, is *contract violation*, by resort to any procedure for resolving disputes other than the grievance procedure established in a *subsisting* contract. Under this examination Respondent's conduct is completely healthy. Respondent resorted to the tactics considered "harassing" by the Board only after the contract had expired.

The general context, moreover, destroys the very purpose for which the Board is using the quotation, to distinguish between partial and complete strikes. The general context is a discussion of the process of reaching agreement between labor and management under the criterion that any strike (complete or partial) is a defeat for collective bargaining. Indeed, there can be no doubt that the Board necessarily realizes this. While the above quotation is from page 9, the Board cites also page 7 of this Report. Bd. Br., 22, n. 4. There is no reference to "diseases" on that page. It is believed that the Board's reference is to the author's statement on page 7 that "A strike thus comes to be regarded as the failure of collective bargaining, while one of the most widely accepted tests of successful collective bargaining is the length of the period during which no strikes or lockouts have occurred."

It is evident that the author would regard a partial strike as well as a complete strike during negotiations

as a "failure of collective bargaining"; and that he would regard complete strikes in violation of contract also as "diseases of collective bargaining, not of its nature."

As if to emphasize that he is integrating what the Board quotes him for segregating, the author, who used "work stoppages" in the page 9 quotation above and "strike" on page 7, in discussing what transpires when the parties have reached an impasse in negotiations, writes on page 8 that "There is then a work stoppage or a strike or lock-out, depending upon the way the impasse is viewed. * * * If uninterrupted production were the only desideratum, we would not be pursuing the course of collective bargaining with its inherent risk of work stoppages." As the same author said in another work, "It is no disparagement of collective bargaining to say that it rests on the right to use the economic power of the strike or the work stoppage to determine or to compromise unresolved issues between unions and managements." Peck, G., *Emergency Disputes Settlement*, Staff Report to the Subcommittee on Labor and Labor Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong., 2d Sess. 3 (1952). There is, then, no basis for the Board to suggest that this scholar shares the Board's aversion to "slowdowns" or that he has ever described them as "diseases" so long as they do not violate obligations under a collective bargaining agreement.

The Board would stretch the Congressional prescription of refusal to bargain, the only statutory provision suggested for its conduct, to such extremes as to render all other provisions of the Act unnecessary and meaningless. The Board in effect reads the statute to justify its actions, rather than the way the statute is written.

As the Act is written, Congress could hardly have been more express and unambiguous in providing that no language in the Act not specifically limiting the right to strike—and Section 8(b)(3) certainly contains no such specific limitation—“shall be construed so as either to interfere with or impede or diminish in any way the right to strike.” (Section 13); and in terms defining the statutory word “strike” as including “any strike or other concerted stoppage of work by employees * * * and any concerted slowdown or other concerted interruption of operations by employees.” (Section 501). The Act also includes a definition of collective bargaining; the specific provisions of that definition were admittedly satisfied by the Union. The statutory duty to bargain collectively has never required more than recognition of the collective bargaining agent and trying in good faith to reach written agreement with the other side; the Union admittedly gave due recognition to the representatives of Prudential and made every effort in good faith to obtain a written agreement.

The Act includes specification of certain types of union economic pressures which are outlawed; the Union admittedly engaged in none of those. The Act protects free speech activities and commands that no expression of views be an unfair labor practice or even evidence of unfair practice; the Board disregarded the Union's contentions with regard to the picketing, passing of leaflets and other free speech activities. The Act requires that the Board find no party guilty of unfair practice except upon the entire record as a whole; the Board in this case expressly refused to consider the entire record and relied only on empty and unsupported generalities.⁶

⁶ “The root of the evil,” in the Board's approach is that “the Board is attempting to convert * * * 8(b)(3) into gateway provi-

While the Board strives to give the appearance of distinguishing between complete and partial strikes, according verbal recognition to the former while castigating the latter, the truth is that its "reasoning" transparently applies equally well to all types of economic pressure against an employer during negotiations. If the Board is upheld now in enjoining partial strikes, on grounds which cannot rationally be distinguished from complete strikes, it may be difficult to reverse the Board should it elect to outlaw the complete strike or any particular forms thereof.

The Board decision, for example, condemned Respondent's activities as "the antithesis of reasoned discussion it was duty-bound to follow. * * * Harassing activities are plainly irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good faith bargaining must rest" * * *. R. 30; 31. Obviously, *any* economic force or pressure is antithetical to reason; a Union that has called a completely effective strike is certainly not relying on Platonic discussion alone to achieve the agreement it desires, any more than an employer who locks out his employees. The partial strike is no more of a departure from pure, sweet reason than the complete strike.

Although it is the Board *decision as made* which is before this Court, *cf. S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87-88, 94-95; 332 U.S. 194, 196, the Board's

sions which will enable it to reach all conduct which it finds antagonistic to "reasoned," "fair," and "balanced" bargaining. I see no evidence that Congress intended to give the Board such a broad grant of unguided discretion, nor would I trust any Board with such powers. *Summers, Comments in "Panel Discussion: The National Labor Relations Act and Collective Bargaining", The University of Michigan Law School, Collective Bargaining And The Law* 57 (1959).

Brief tacitly concedes the indefensibility of the Board's decision that any use of economic power contravenes the statutory concept of collective bargaining as pure reason. To the contrary, the Board postulates the exactly contrary premise that the availability of effective weapons to both sides is an indispensable prerequisite to the successful operation of collective bargaining. Bd. Br., 24.

Furthermore, while the Board decision held in so many words that "it is unnecessary to show * * * that this conduct actually affected the negotiations or the Company's business", R. 30, the Board's Brief does not mention this holding. As to effect on the Company, the Brief actually takes the opposite tack, asserting as fact precisely what the Board did *not* find, that "the Union's conduct here was highly damaging to the Company." Bd. Br., 28.

The Board's decision on effect upon the negotiations is even more extreme and arbitrary than it appears on first reading. All it appears to say is that showing evil impact on bargaining is not a necessary element of the prosecution's proof of a failure to bargain charge. What the Board in effect held in this case was that it would not consider an affirmative defense, proving good faith in fact in the bargaining itself. The Union introduced evidence as to the actual course of the negotiations. But the Board held that the actual course of bargaining was irrelevant in a refusal to bargain case!

The Board's discussion of the Union position was limited to a distortion. The Board declared that "the fact that Respondent continued to confer with the Company and was desirous of concluding an agreement

does not *alone* establish that it fulfilled its obligation to bargain in good faith," R. 30 (emphasis in original), as though this were the issue. It was not and it is not. The issue is whether the Board may completely disregard such facts. The issue is the validity of a conclusion of bad faith bargaining based on express refusal to consider the facts as to good faith bargaining—reasonable discussion, free give and take, patience and understanding—at the bargaining table. The obligation is not on the Respondent to prove its innocence of the charge that it refused to bargain collectively, but on the Board to prove guilt.

The issue is whether the Board may find refusal to bargain, *per se*, on no other foundation than the solitary fact that a union utilized activities the Board considered "harassing" during the period of collective bargaining negotiations. There was no other evidence introduced; specifically, as we have seen, there was nothing offered to support any of the invectives used by the Board in its decision or Brief. There was nothing about "balanced bargaining relations" or whether Respondent was "circumventing the orderly and peaceful procedures of collective bargaining", phrases used in the decision to express the Board's conclusion, just as there was nothing about "the philosophy of collective bargaining" or any "foul blows" thereto or any "diseases" thereof.

When the Board has so clearly indulged in a *per se* decision, it is nonsense to speak of administrative balancing. Reliance on such balancing is the principal if not the sole theme of the Board Brief. Balancing or juggling there might have been of the most generalized concepts and preconceptions, but there was no consideration or review of the particular facts of this

record. In a sense, the Board balanced the scales by disregarding the affirmative defense and statutory contentions of the Respondent, and by awarding its decision to the other side on the basis of its own preconceptions of proper collective bargaining policy. But if that is the sort of balancing which this Court should uphold, administrative expertise is synonymous with administrative fiat.

This case is an effort by the Board to seize powers which Congress has deliberately elected to deny the Board—and the Board itself can be cited in support of this statement. In April, 1949, a date over a decade closer to the enactment of Taft-Hartley than October, 1959, the Board filed a document with this Court which undertook a comprehensive and authoritative analysis of the Congressional intention in that legislation. *Auto. Workers v. Wisconsin Board*, Nos. 14 and 15, October Term, 1948, Brief for the National Labor Relations Board as *Amicus Curiae* in Support of Petition for Rehearing (hereinafter cited as “Bd. 1949 Pos.”). That document expressly declares that Congress deliberately elected to reject administrative action—state or federal—as the means for dealing with what it regarded as the problem of unprotected concerted activities, but chose to rely solely on private action, the employer’s powers of discharge and discipline. That document makes the same reading of the legislative history and the text of the statute, in point after point, as will be made in this Brief, but to the contrary of what is now proposed by the Board. See pp. 40, 46 n. 7, 84-86, 95, *infra*.

Why should the Board in this case urge a view of its own powers flatly contrary to the one it earnestly argued to this Court in 1949? The difference hardly

lies in the legislative history or the statutory terminology: These have not changed. The difference can evidently lie only in the abandonment of administrative self-restraint. The Board is now apparently unwilling to be limited by the text and the purposes of the Act. In this case the Board seems to have become so impressed with its own accumulated expertise and special viewpoints that it is assuming general, legislative authority over collective bargaining, without any restraints on its administrative discretion and without regard to statutory restrictions.

This Board decision is precisely the kind of administrative excess against which the judiciary is the only effective guardian in particular cases. To this Court the Respondent must look for protection against a Board that sees no limits in the statute to its dominion over collective bargaining.

II. THE BOARD IS PROHIBITED FROM REGULATING THESE UNION ACTIVITIES

A. The Plain Words of Sections 13 and 501(2) Include These Union Activities in the Right to Strike Which Congress Safeguarded Against Board Regulation

The clearest statutory answer to the Board's arrogation of power in this case is the Congressional definition of the right to strike which was safeguarded against Board regulation. Section 13 provides that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *." The Board does not assert—as it cannot—that any specific provision of the Act authorized it to interfere with or impede or diminish in any way this Union's right to strike.

Nor does the Board deny that Section 501(2) defines "strike" as including "any strikes or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." There could hardly be clearer coverage of the precise activities of which the Board is complaining in this case. The Board in 1949 recognized the comprehensive reach of this Congressional language. "It cannot be suggested", the Board argued to this Court, "that any phase of regulation of work stoppages as a matter of labor relations policy is outside the field covered by Congress in the Act. The comprehensive definition of strikes in Section 501(2), itself shows that Congress covered that entire field." Bd. 1949 Pos., 60-61.

The Board actually argues that Section 501 should be applied only to the Sections involving "the prohibitions and penalties against strike action" and this because "the temper of Congress" in enacting Taft-Hartley was generally anti-labor. Bd. Br., 35, 34. To accept this gross argument is to award the Board unlimited authority to restrict union bargaining tactics. This argument is not only shocking under any concept of impartial administration of law and, also, an open refutation of the Board's claim of "balancing" opposing interests. It is, further, an across-the-board abandonment of the principles of statutory construction. For reliance on the general Congressional mood relieves the Board of any obligation even to look at the particular Congressional language.

The Board's cavalier approach to statutory construction cannot be sustained. "Most relevant, of course,"

to a determination of the meaning of this Act, "is the very language in which Congress has expressed its policy * * *." *Carpenters' Union v. Labor Board*, 357 U.S. 93, 100. If that language is unambiguous—as is Section 501(2)—there is no need to resort even to the legislative history specifically involved. *Ex parte Collett*, 337 U.S. 55, 61; *cf. U. S. v. Public Utilities Comm'n*, 345 U.S. 295, 315. The Board's approach seems the exact opposite: it is that the Act must be construed to uphold the Board, whatever the statutory language or legislative history.

There is nothing, not the faintest implication or expression in any of the Congressional language, that permits or condones a piecemeal and discriminatory interpretation of the statute such as the Board proposes. The definition in Section 501 groups a series of actions under the single word, "strike". Each of the different elements in the definition is on an identical statutory plane with each of the others. The complete strike has no different or better status than the partial strike. The Court below was clearly correct in not permitting the Board to draw any inference of refusal to bargain from "a partial withholding of services" which could not be "drawn from a total withholding of services, during negotiations, in order to put economic pressure on the employer to yield to the Union's demands." *Textile Workers*, 97 U.S. App. D.C. at 37, 227 F.2d at 411.

As Congress has unified partial and complete strikes in its definition, they must stand or fall united. Section 13 makes use of the one, unqualified word, "strike", the word defined in Section 501(2). Section 13 safeguards a single undivided and indivisible entity, "the right to strike".

In enacting Taft-Hartley, Congress clearly was aware that it had introduced specific limitations on the right to strike, for example, in Section 8(b)(4) as to strikes for certain purposes and in 8(d)(4) as to notice and timing prerequisites for striking; and had thus created an apparent inconsistency between those Sections and the unqualified protection of the right to strike in Section 13 as it read under the Wagner Act. Accordingly, Congress added to the language of the Wagner Act the words now appearing at the conclusion of Section 13, "or to affect the limitations or qualifications on that right."

As thus amended, Section 13 created one particular exception, the union acts specifically proscribed by Congress, to the general rule of safeguarding the right to strike as Congressionally defined against Board encroachments. This specific exception Petitioner desires to make the general rule, so that the Board may attack any union action it considers "harassing". But the very purpose of Section 13 is to prohibit Board action, except as otherwise specifically provided, against the union activities specified in the definition of "strike".

This Court has held that Section 13 applies uniformly throughout the statute, and that the requirement of "specifically provided" must be strictly construed. "Inasmuch as strikes against unfair labor practices are not anywhere specifically excepted from lawful strikes, § 13 adds emphasis to the congressional recognition of their propriety." *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 284. "By § 13," the Court declared in *Labor Board v. Rice Milling Co.*, 341 U.S. 665, 673, "Congress had made it clear that § 8(b)(4).

and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is "specifically provided for" in the Act. No such specific provision in § 8(b)(4) reaches the incident here." If the Board is subject to the restrictions of Section 13 when its actions are based on 8(b)(4), which "describes and condemns specific union conduct directed to specific objectives", *Carpenters' Union v. Labor Board*, 357 U.S. 93, 98, the Board is, *a fortiori*, subject to Section 13 when its actions are based, as in this case, solely on Section 8(b)(3), a general section which contains no specific limitation on the right to strike.

In the *Rice Milling* case, *supra*, the union activity the Board sought to enjoin was not a completely effective strike nor even a reduction or cessation of work. The only union activity involved was picketing by non-employees. If the picketing had been carried on by employees during negotiations for the purpose of reaching agreement, the Board would evidently have sought to enjoin it under 8(b)(3) as a "harassing tactic", under its present theory. The Board could not have been sustained, any more than it can be sustained here, under Section 13 and *Rice Milling*.

This Court has also held that Sections 7 and 13 "safeguard collective bargaining, concerted activities and strikes between the primary parties to a labor dispute * * *". *Labor Board v. Denver Bldg. Council*, 341 U.S. 675, 687. Only the primary parties—Respondent and the Employer—were involved in this labor dispute. Accordingly, this Court's applications of Section 13 are antithetical to the Board's position and require the conclusion that this Board order, being a qualification

and limitation of the right to strike as defined by the Congress in Section 501(2), was prohibited by the Act.

B. This Court Has Held, Particularly in *Auto. Workers v. Wis. Board*, 336 U.S. 245, That the Board Lacks Statutory Authority to Regulate or Prohibit These Union Activities

Respondent submits that *Auto. Workers v. Wis. Board*, 336 U.S. 245, definitively holds that interruptions of work which are partial rather than complete strikes may not be prohibited by the Board. The Board is in error in writing that *Auto. Workers* "was not intended to grant a dispensation or protection for slowdowns or similar harassing tactics." Bd. Br. 33, 34, if it implies that there was no immunity extended against prohibition of such activities by the Board. It is conceded that the activities here are no more open to Board prohibition than those in *Auto. Workers*; the Board treats both cases as involving the identical issue of "harassing tactics". See, e.g., Bd. Br. 35, n. 15.

This Court could not have been more explicit in holding that the "partial" strike activities involved in that case were not subject to prohibition by the Board. Early in its opinion, the Court stated, "Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct * * *." 336 U.S. at 253. And the Court reiterated that "the federal Board has no authority either to investigate, approve or forbid the union conduct in question." *Id.* at 254. Specifically in the context of the application of Sections 13 and 501(2), the Court declared that the Act "still gives the Federal Board no authority to prohibit or to supervise the activity which the State Board has here stopped nor to entertain any proceeding concerning it * * *." *Id.* at 263. Again, the Court said, "W

think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby." *Id.* at 264-265. Finally, the concluding sentence of the opinion referred to "a course of conduct neither made a right under federal law nor a violation of it * * *." *Id.* at 265.

This unequivocal and emphatic holding of the Court has never been qualified or impaired,⁷ and has been

⁷The Board, while apparently agreeing that the "neither protected" portion of *Auto. Workers* is still good law and not attacking the "nor prohibited" portion, contends that the consequent holding that it has no authority has somehow been rendered "untenable" by three later cases, *Automobile Workers v. Wisconsin Board*, 351 U.S. 266, *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656, and *United Automobile Workers v. Russell*, 357 U.S. 634. Id. Re. n. 15, 35, 36. Each of these cases upholds State action in deference to the police power; each deals with violent conduct, which is a special and exceptional circumstance. *San Diego Unions v. Garmon*, 359 U.S. 236, 247; *Hotel Employers v. Sgr Enterprises*, 358 U.S. 270, 271. None upholds the Board's assertions of authority here or supports its derogation of the holding in *Auto. Workers* that the Board has no authority where the activity is neither protected nor prohibited.

Contrary to the Board's position, it is well recognized that this Court's decisions have established a category of labor "conduct which is neither protected by Section 7 as 'concerted activities' nor forbidden as a union unfair labor practice by Section 8(b). Quickie strikes (citing *Auto. Workers*), slowdowns and strikes in breach of contract are obvious illustrations." Cox, *The Labor Decisions of the Supreme Court at the October Term 1957*, 12, ¶, in *American Bar Association, Section of Labor Relations Law: 1958 Proceedings*.

Thus, allowing the Board to enjoin harassing tactics such as those involved in *United Auto. Workers* would necessitate overruling that case. Furthermore, section 13 of the NLRA seems specifically to deny the Board the power to enjoin such harassing tactics. (Quoting that Section and also 501(2)). Thus prohibition of such harassing activities should not be implied from sec-

cited and adhered to in subsequent cases. In *Auto. Workers*, the conduct was neither forbidden or legalized by the Federal Act. *Automobile Workers v. O'Brien*, 339 U.S. 454, 459. The *Auto. Workers* case presented "an instance of injurious conduct which the

tion 8(b)(3).²² Note, *Union Refusal to Bargain: Section 8(b)(3) of the National Labor Relations Act*, 71 Harv. L. Rev. 502, 510 (1958).

If a union refused to tell an employer its demands and desires, it could hardly be supposed to be engaged in bargaining, or manifesting a desire to reach satisfactory agreement. Thus in the *Auto. Workers* case, the failure of the Union to state its position would be a possible ground for the Board to have asserted jurisdiction under Section 8(b)(3) there, a ground wholly unavailing here. Accordingly, the only reference by the Board to 8(b)(3) as any possible basis of its jurisdiction in that case was precisely to this one, limited basis. In addition to its authority to reach violent conduct under Section 8(b)(1)(A), the Board argued it "would be empowered to consider a charge that this series of concerted work stoppages violated Section 8(b)(3) *by virtue of the facts* as found by this Court (slip op. p. 3) that 'The employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them.'" Bd. 1949 Pos., 31 (emphasis added). See *Textile Workers*, 108 NLRB at n. 10 and accompanying text.

The Board's suggestion that it may consider a union's threats of violence as one factor determining refusal to bargain, Bd. Br. n. 15, 36, is strikingly inapposite in this case where there is no violence and where the Board expressly refrained from considering all the facts of record. In any event, to reach violence, a Board complaint more properly would have relied upon § 8(b)(1)(A) or would have addressed itself to local authorities. The substitution of violent coercion in place of peaceful persuasion would not of itself bring the complained-of conduct into conflict with § 8(b)(4) [or § 8(b)(3)]. It is the object of union encouragement that is proscribed by that section, rather than the means adopted to make it felt [citing *Auto. Workers*, 336 U.S. at 253].²³ *Labor Board v. Rice Milling Co.*, 341 U.S. 665, 672. The Board itself advised this Court that Congress intended that "violence" be reached by the Board under Section 8(b)(1)(A), no other Section. Bd. 1949 Pos., 7-8, 30.

National Labor Relations Board is without express power to prevent * * *." *Garner v. Teamsters Union*, 346 U.S. 485, 488, cited for this interpretation of *Auto. Workers* in *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656, 664. In *Auto. Workers*, "The Court upheld the state injunction on the ground that such conduct was neither prohibited nor protected by the Taft-Hartley Act and thus was open to state control." *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 477. As recently as last Term, this Court cited *Auto. Workers* as an illustration of the very category of union activity which the Board argument here assumes to be non-existent, union activity "neither protected nor prohibited". *San Diego Unions v. Garmon*, 359 U.S. 236, 245.

This Court "undertook for itself to determine the status of the disputed activity" in *Auto. Workers*. *San Diego Unions v. Garmon*, 359 U.S. 236, 245, n. 4. For the reason that *Auto. Workers* governs the particular union activities at bar, Respondent's conduct cannot possibly be "arguably subject to § 7 or § 8 of the Act" and thus open to any Board scrutiny. *Id.* at 245.

In *Auto. Workers*, the question was whether the State of Wisconsin, acting through a statute and an administrative body similar in general purpose to the Federal Act and the Petitioner Board, could order a union to cease and desist from intermittent and unannounced work stoppages. The Wisconsin statute expressly made it an unfair labor practice for employees acting in concert "To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of

going on strike." 336 U.S. at 248, n. 1. Had the Court believed that any provision of the Act enabled the Board to regulate such conduct, it would not have sustained Wisconsin's action.

At the same Term, the Court refused to allow the Wisconsin Board to certify a bargaining representative in an industry in interstate commerce where the National Board had certified none, holding that "The uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy." *LaCrosse Tel. Corp. v. Wis. Board*, 336 U.S. 18, 26. While the Court during the same Term permitted Wisconsin to enforce its own policy on maintenance-of-membership discharges prior to the Taft-Hartley Act, it said "the enumeration by the Wagner Act and the Taft-Hartley Act of unfair labor practices over which the National Board has exclusive jurisdiction does not prevent the States from enforcing their own policies in matters not governed by the federal law * * *." *Algoma Plywood Co. v. Wis. Board*, 336 U.S. 301, 314. Necessarily, the Court could not have upheld Wisconsin in *Auto. Workers*, if the Court had believed that the Board could possibly exercise any jurisdiction over the union activity there involved. *San Diego Union v. Gurnea*, 359 U.S. 236, and cases cited therein.

What the Court held in *Auto. Workers* was that a State had power to regulate the activities involved. The Board had none. State regulation was permitted because the Wagner Act removed the doctrine of conspiracy as a valid legal basis for the State's inhibiting union activity, but conduct otherwise illegal under

generally applicable State law was not rendered legal. 336 U.S. at 257-259. Section "13 plus the definition only provides that 'Nothing in this Act * * * shall be construed so as to interfere with or impede' the right to engage in these activities. What other Acts or other state laws might do is not attempted to be regulated. Since reading the definition into § 13 confers neither federal power to control the activities in question nor any immunity from the exercise of state power in reference to them, it can have no effect on the right of the state to resort to its own reserved powers over coercive conduct as it has done in this instance." *Id.* at 263-264 (decision in original). Unlike the State of Wisconsin, the Board has no possible shadow of a colorable claim to authority other than the Act itself. *Auto. Workers* plainly holds that the Board may not assert any such authority, because of Sections 13 and 501(2).

III. THE BOARD HAS NO STATUTORY AUTHORITY TO ENJOIN A UNION'S USE OF OTHERWISE LAWFUL ECONOMIC PRESSURE TACTICS ON THE GROUND THAT SUCH TACTICS ARE IN VIOLATION OF THE DUTY TO BARGAIN COLLECTIVELY

A. The Unfair Practice of Refusing to Bargain Collectively

- 1. The Unfair Practice of Refusing to Bargain Collectively Encompasses Only the Process of Bargaining With a Representative of the Other Side and Attempting in Good Faith to Reach Written Agreement. It Does Not Otherwise Affect the Economic Powers or Tactics Either Side May Use**

a. The Fundamentals of Collective Bargaining: Pre-Wagner Act

Drawing a distinction between the collective bargaining *process* and bargaining *powers* helps to clarify the difference between the parties in this case. By the collective bargaining process we here mean only the procedure of meetings between representatives of man-

agement and labor, with the labor side being represented by a collective spokesman, the union. In this sense, collective bargaining is a procedural means for framing issues and resolving disputes peacefully, in that sense like the discussions between counsel for the settlement of a lawsuit or diplomatic negotiations between nations in controversy. In essence, by collective bargaining process we refer to the Congressional definition of collective bargaining, Section 8(d) of the Act, discussed in B. *infra*.

Bargaining power, on the other hand, refers to something quite different. It refers to the substantive forces which determine the relative strength of the parties and thus, in large if not complete measure, govern the substantive result of the bargaining. Any appraisal of bargaining power is complex and a matter of opinion rather than scientific measurement, but would clearly include such factors as the financial strength of the parties, the state of the labor market and the market for the particular product; as well as any weapon, tactic or pressure which one side can bring to bear upon the other in order to obtain the agreement which it wants.* Bargaining power denotes the ability of the party to inflict the maximum economic damage on the other side, as well as the capacity to withstand whatever the other side inflicts.

* Chamberlain, N. W., in *Collective Bargaining*, for example, includes a complex analysis of bargaining power, emphasizing that "The right to strike cannot be equated with bargaining power" and that "The nature of the objective sought is determinative of bargaining power no less than is the bargaining skill or financial resources or membership strength of the organizations involved." pp. 216, 221.

In other words, the distinction is essentially the difference between the first and second paragraphs of the following:

"First, collective bargaining is strictly a *relationship between organizations*. Contrary to a mistaken belief in many quarters, collective bargaining is not a relationship between management and workers. * * * collective bargaining is confined to dealings between company spokesmen and the *representatives* of the union which is the bargaining agency of the employees.

"Second, collective bargaining is a *power relationship between organizations*. * * * Stated more bluntly, collective bargaining does not exist unless each party is free to negotiate with a club which is within handy reach in case of necessity."

These two concepts are distinguishable. The process of bargaining can proceed whatever the relative bargaining powers of the parties. So long as there is good faith recognition of the union as the collective spokesman and a genuine effort to reach written agreement, the process of collective bargaining is functioning, whether the bargaining powers of the two sides are in delicate balance or are so one-sided that the ultimate result will be tantamount to the fiat of one side.

This distinction helps explain the development of collective bargaining law. Respondent believes that the refusal to bargain provisions of the law refer to "collective bargaining" in only the process sense. As we shall attempt to show in this section of the Brief, this is because collective bargaining, however defined, was

⁹ Harbison, F. H., "Collective Bargaining and American Capitalism," in Kornhauser, Dubin and Ross, *Industrial Conflict* 270 (1954) (emphasis in original).

originally and has always been conceived of as a private, voluntary affair, with legislation being only in terms of the minimum required to rectify specific abuses or gross imbalances of power between labor generally and management generally. Except as the legislation specifically provided otherwise, the parties have been left free.

As we have just seen, the Act thus expressly provides with respect to the bargaining power on the union side. Section 13 demonstrates that bargaining powers have been treated as a separate and distinct subject by Congress. "Though the National Labor Relations Act encourages negotiation and seeks to reduce industrial strife, it does not forbid industrial strife." *Textile Workers*, 97 U.S. App. D.C. at 37, 227 F.2d at 411. In consonance with our distinction between the collective bargaining process and bargaining powers, "There is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants." *Ibid.*¹⁰

If this distinction between the process and the powers is sound, there is no basis for the Board's action in this case. For there is no dispute between the parties as to Respondent's participation in the bargaining process as above defined. The Board seeks only to enjoin Respondent's use of its bargaining powers. The

¹⁰ "If 'balanced bargaining relations' as used in the Board's *Textile Workers* decision, 'suggests a duty on the part of an employer or a union to exercise restraint in the use of its superior economic strength to obtain a favorable settlement, the Board has quite clearly added something to the basic philosophy of the collective bargaining process.' Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 Mich. L. R. 807, 825 (1959). See also Comment, 25 Ford. L. Rev. 319, 329-330.

Board finds no fault with the conduct of Respondent in the bargaining process.

The Board position in this case requires that no distinction be drawn between process and powers. The two must be treated as inseparable or there will be no plausible basis for attempting to regulate bargaining powers on the basis of the statutory mandate that parties not refuse to bargain collectively. For this reason the Board discusses the history of union bargaining powers and weapons. It appears to develop as a main argument the following stacking of generality upon generality: Prior to the Wagner Act, American industrial relations history shows that only the complete strike was a "classic", "traditional" or generally acceptable exercise of union bargaining power; this history is the essence or an essential ingredient of "the philosophy of bargaining as worked out in the labor movement in the United States"; this philosophy became incorporated into the Wagner Act, tacitly but *in toto*, and thence into Taft-Hartley—therefore, the Board can enjoin all partial strike activities and prohibit all union bargaining weapons which it does not classify as "classic," or "traditional" or acceptable. This is astounding "reasoning".

While Respondent believes that the very statement of the Board argument provides its refutation, prudence and precaution commend fuller discussion. Accordingly, we shall discuss (1) the conceptual fallacies in the Board position, (2) the history of unionism and union tactics prior to the first effective Federal legislation protecting the right to organize and to bargain collectively, and (3) the decisions of this Court which demonstrate that "the philosophy" mentioned by the Court is synonymous with the bargaining "process".

as above discussed and provide no support for any bureaucratic interference with bargaining "powers".

(1) The Board states that "slowdowns, intermittent refusals to work, and other actions taken during working time and calculated to injure or disrupt the employer's business—stand on an entirely different basis" from the right to strike completely. "Such tactics are not a traditional weapon in the labor movement * * * and their availability is not essential to free collective bargaining." Bd. Br. 26-27. This position draws no genuine distinction between partial and complete strikes, is utterly unrealistic, grossly misrepresents the authorities it appears to rely on and is false historically.

First, this position does not actually draw a distinction between complete and partial strikes although it is apparently intended to do so. A complete strike certainly continues during working time. It is, therefore, action "other" than "slowdowns" and "intermittent refusals to work" which is "taken during working time and calculated to injure or disrupt the employer's business." The thrust of this Board statement necessarily, although perhaps inadvertently, is to treat all union weapons alike, complete and partial strike tactics identically.

The only explanation suggested in the Board Brief for the assumption that the availability of complete strikes is essential to free collective bargaining is the thesis, noted above, that free collective bargaining requires that there be "an effective threat of resort to economic power" on the union as well as the employer side. If this be true, to the extent that the partial

strike either in general or in any particular case is "an effective threat of resort to economic power," it becomes by virtue of the Board's own argument, not inconsistent with and, indeed, essential to free collective bargaining.

Moreover, the Board position freezes collective bargaining behaviour as of some past, undefined date. Union tactics must not change after that unspecified date, pontificates the Board. What is not "classic" or "traditional" or "normal" is prohibited. The entire industrial relations picture may change, the problems of particular industries or unions may be transformed by a thousand and one events, but no new weapons or tactics may be created or utilized. Like King Canute, the Board orders the tide of industrial history to reverse itself. And this behaviour is sought to be justified by extolling the administrative flexibility and continuing expertise of the Board.

Finally, even assuming that the Board could make a logical case for freezing only partial strike tactics as of some undisclosed past time, its historical premise that such tactics were not used does not survive analysis. While the Board cites a parade of economic authorities seemingly for the proposition that only the complete strike is a "traditional", "classic" or acceptable weapon of labor, Bd. Br., 26, n. 6, none of them says any such thing. A few, in fact, expressly disclaim any intent to discuss bargaining powers.¹¹

¹¹ *Collective Bargaining Procedures* by N. W. Chamberlain, states at the outset (p. 5) that strikes and lockouts "are manifestations of bargaining power rather than of collective bargaining and for that reason they are not analyzed in this book." *Collective Bar-*

Some others actually include the "slowdown" as a weapon additional to the completely effective strike. See pp. 58-61, *infra*, where the historical facts are summarized. To the extent that the remaining works do discuss strikes in the course of collective bargaining, they uniformly treat the "strike" as the complete strike as the *ultimate* weapon of labor. In the context of describing how agreement is reached by the parties, they state that if the dispute is not resolved by peaceful bargaining, the sides *may* resort to the weapons at their disposal, *including* the respective rights to lock-out and to strike.¹² In other words, the parties will re-

negotiating, by L. J. Smith, is a book which "furnishes a step-by-step procedure for carrying out the practice of collective bargaining" (P. 9). The discussion of "strikes" to which the Board makes reference is a discussion of no strike clauses in collective bargaining contracts; the point made is that the contract governs the ordinary day-to-day relationships, which are obviously not the relationships during the bargaining period prior to the signing of the contract. The author suggests questions which a model no strike clause should answer, for example:

10. What actions of the employees shall constitute a strike?
 - a. Sit-down?
 - b. Work stoppage?
 - c. Slow-down?
 - d. Mass absenteeism?
 - e. Mass restriction of production or quality? (Pp. 210-211)

Harbison and Coleman stated that in *Goals and Strategy in Collective Bargaining* they were developing "a concept of collective bargaining we feel has particular meaning in America's mass production industries" (p. viii), rather than a generally applicable discussion.

¹² In *Government Regulation of Industrial Relations*, by G. W. Taylor, for example, the statement is "Any problem not peaceably resolved *could* be subject to arbitrament through strike or lock-out." (P. 53, emphasis added). This is the sentence immediately preceding the sentence, "Collective bargaining operates in that way," quoted at Bd. Br. 26. There is no doubt in Dr. Taylor's

sort to economic force if they are not satisfied with the results of the collective bargaining. This is the sum and substance of the discussion. On the labor side, they point out, the complete strike theoretically constitutes the most pressure which a union can exert against an employer.

Not one word of these writings suggests that labor or management always used in practice the weapon which theoretically damaged the other side the most. As these authorities point out and as is obvious, there are other considerations besides the amount of damage to the other side, for example, the likely and potential damage to one's own side.

These authorities offer no support whatever for the proposition for which the Board cites them, that the total strike is the *only* union weapon consistent with conceptually pure collective bargaining. Rather, they prove the opposite: that the availability and use of *any* economic weapon, even including the complete strike which inflicts the maximum damage on the short-run "public interest" as well as on the employer is consonant with collective bargaining; and is

mind that there are other forms of union pressure which are now still available if not specifically proscribed by § 8(b)(4). "Economic power possessed by labor organizations can be freely directed against an employer to back up most demands for improved working conditions. . . . But a number of specific uses of economic power against employers are prohibited. . . . the boycott was a union weapon of proven effectiveness." (Pp. 270-271, 272).

Chamberlain, N. W., in *Collective Bargaining*, discusses weapons of labor other than the complete strike, including picketing, boycott and slowdown, at pp. 221-228.

None of the citations at Bd. Br. 26 n. 6, refers to any definition of "strikes" or any discussion whatever suggesting that unions never engaged in any other pressure tactic than the complete strike

further, part and parcel of the accepted procedure whereby labor and management reach agreement in the American economy.

(2) As a matter of historical fact, the Board's assertions that these tactics are not "traditional" or "classic" are plainly false; Unions, like employers and even institutions and people generally, have traditionally adopted whatever means have seemed to them the most effective way of serving their own interests in any particular situation. The "weapons of labor" include more than the "strike," one authority has said, listing examples of other weapons as "picketing, boycott, sabotage, mass protest and demonstration."¹²

Boycotts, for example, have long been a traditional weapon of labor.¹³ See, e.g., *Duplex Printing Press v. Deering*, 254 U.S. 443 and *Bedford Cut Stone Co. v. Journeymen Stone Cutters*, 274 U.S. 37, both of which involved, in the words of Mr. Justice Brandeis, dissenting, a strike "against the product", a "refusing to expend their labor upon articles", 254 U.S. at 480, 481, and "a mere refusal to finish particular work . . . the only means of self-protection," 247 U.S. at 63, 65. The "philosophy of collective bargaining as worked out in the labor movement in the United States" thus, long before the Wagner Act, embraced the partial strike activities of continuation at work except for the particular products or articles being boycotted.

¹² Yellen, S., *American Labor Struggles*, xi-xii (1936).

¹³ See, e.g., Oakes, E. S., *The Law Of Organized Labor and Industrial Conflicts*, 598-740 (1927); 2 Enc. Soc. Sci. 662, 663-665 (reissue ed. 1944).

Economic authorities, including those cited by Petitioner, have recognized and reported the facts that union weapons and tactics have not been limited to the complete strike; and that unions have regarded partial as well as complete strikes as in the category of "strike" or acceptable mode of exerting economic pressure on the employer. One work cited by Petitioner, for example, states, "The union's principal techniques are the strike, the slowdown, and the boycott. * * * In the *slowdown*, a less effective form of the strike, the workers reduce output without actually leaving the plant * * *. The strike is by far the most important of these techniques."¹⁵

The "slowdown" as well as the "quickie" and other variations of the "strike" are typically discussed under some general outline heading such as "The Strike: Purposes and Methods."¹⁶ Slowdowns were traditionally especially common in certain industries, such as "harvesting, lumbering, casual labor in road construction, longshore work, and so on."¹⁷ They were used also in mass production industries, and the employers involved regarded the "slowdown" as a

¹⁵ Warren and Bernstein, *Collective Bargaining*, 26-27 (1949) (italics in original); and see Daugherty and Parrish, *op. cit. infra*, n. 16.

¹⁶ Daugherty, C. R. and Parrish, J. B., *The Labor Problems of American Society*, 399; also 591 (1952); Bakke, E. W. and Kerr, C., *Unions, Management and the Public*, 418-424 (1948); Dankert, C. E., *Contemporary Unionism in the United States*, 393 (1948); Taft, P., *Economics and Problems of Labor*, 575-578 (3rd ed. 1955). Some of the academic discussions of "slowdowns" is (like the "diseases" reference, in the context of contract violations rather than negotiations. See Hammett, R. S., Siedman, J. and London, J., *The Slowdown As A Union Tactic* (1957).

¹⁷ Brooks, R. R. R., *When Labor Organizes* 110, 110-111 (1937).

"strike".¹⁸ The use of "the quickie" strike "goes back at least to World War I."¹⁹ The history as well as the concept of collective bargaining powers thus accords partial strike activities no less respectability and status than complete strike activities.

Unions, after all, "were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. * * * Union was essential to give laborers opportunity to deal on equality with their employer." *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209. Whatever unions could do to attain equality of bargaining power with the employer, they did. Obviously, they were not concerned with any such concepts as "unprotected activity" which have grown up only because of legislation. They were concerned with forcing employers to recognize and bargain with them by means of every weapon, tactic and pressure they believed effective and appropriate.

As labor became better organized and its power became more effective, politically as well as economically, the use of collective bargaining became more extensive. This was because the employer decided it was in his own best interest to deal with the union, rather than

¹⁸ See, e.g. Chrysler Corporation, *Slow Down: A Documentary Record of the Strike in Chrysler Corporation Plants From Oct. 6 to Nov. 29, 1939* (1939); Daugherty, C. R., *Labor Problems in American Industry* 345 (1948-1949 impression).

¹⁹ Dankert, *op. cit. supra*, n. 16, at 394. As the Board cites British experience in Webb, S. and B., *Industrial Democracy* (1920), it seems pertinent to note that "Canny methods—variously called go slow, slow-gear strike, lazy strike, folded-arms strike, and so on—have been used in different ways and for different ends" since 1896. Knowles, K.G.J.C., *Strikes: A Study In Industrial Conflict* 18 (1952).

continue to set or bargain compensation and working conditions on an individual employee basis. The resort to collective bargaining was always a practical choice made by the autonomous parties in the individual case, under their own free, independent evaluation of the balance of power and their own selfish interests:

Both parties to collective bargaining were, traditionally, interested only in maximizing their own power potential and gaining the best bargain they could. Their evaluation of their own bargaining position was their own, a free, voluntary, private act. Upon that evaluation, the parties decided what positions to take in collective bargaining if they were engaged therein; and the employer decided whether or not to bargain collectively. When there was dispute, the parties somehow came to agreement themselves and the employees returned to or continued with the performance of all of their duties.

Nothing could be further from "classic" or "traditional" American collective bargaining than the kind of Government dictation Petitioner proposes. Petitioner contends that the Board has the continuing responsibility, not merely the discretionary authority, to enforce a precise balance of bargaining powers. But collective bargaining is a fact of private economic life, not an academic administration equation. It cannot be argued that it serves free collective bargaining for the State to take bargaining power from one side according to its economic ability or give it to the other on the basis of need. For *free* collective bargaining that government is best which governs least.

(3) When Federal legislation was enacted, it was not designed to provide government control of collective bargaining, but to solve specific problems. Con-

gress acted to remove the various legal doctrines, such as criminal conspiracy, which the Courts had used to block the free growth of unions. *Auto Workers v. Wis. Board*, 336 U.S. 245, 257-258. The employer could no longer discriminate against employees and discharge them for union activity; and he had to meet with the union, if it represented a majority of his employees, and attempt in good faith to reach written agreement. Otherwise, the employer retained all authority he previously had over his employees; he maintained his economic powers and was not required to make any agreement he decided not to make in his own self interest. As the decisions of this Court make clear, Congress did not intend that the employer's bargaining powers were curtailed to any but the minimum extent required for the operation of the collective bargaining process, as above defined.

The decisions on the Railway Labor Acts of 1926 and 1934 throw light on this Court's conception of the collective bargaining process protected by Congressional legislation. In addition, "the philosophy of bargaining" quotation, which constitutes so much of the foundation of Petitioner's Brief, is taken from one of these cases.

In sustaining the constitutionality of the 1926 Act, this Court pointed out that Congress had prohibited "interference with the selection of representatives for the purpose of negotiation and conference between employers and employees * * *." *Texas & N. O. R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 570. Of the 1934 Railway Labor Act, this Court said, "Its major objective is the avoidance of industrial strife, by conference between the authorized representatives,

of the employer and employee." *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 547.

In *Order of Railway Telegraphers v. Railway Express Agency*, 321 U.S. 342, arising under the latter Act, the Court was confronted with the contention that individual contracts had superseded the collective agreement made by the Union. "If this were true," the Court declared, "statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually." Then, with only two sentences which state the contentions of the employer intervening, the Court made the general statement upon which the Board relies so heavily here: "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." 321 U.S. at 346, Bd. Br. 17, 19-20, 30.²⁹ Thereafter, again with only two sentences intervening which referred to the employer's contention that exceptional individual cases could be excluded from the duty to bargain with the one collective representative, the Court held, "Hence effective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions." *Id.* at 347:

²⁹ That philosophy was one of private action; the intervention of Government, of a legislative requirement for collective bargaining is necessarily a fundamental deviation from the philosophy of collective bargaining as worked out in the labor movement in the United States. See Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 Mich. L. Rev. 807, 809-810, 830 (1959).

Without question, the "philosophy of bargaining" to which the Court referred in this case was concerned solely with the philosophy of collective as opposed to individual bargaining. The Court's purpose was to insure that employees could be effectively represented through one organized representative. The meaning of the "philosophy of bargaining" phrase is thus the equivalent to the definition of collective bargaining "process" used herein.

The "history" (as well as the "philosophy") of "the collective bargaining process" has been cited by this Court as demonstrating that the "object" of collective bargaining "has long been an agreement between employers and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing, which serves both as recognition of the union with which the agreement is reached and as a permanent memorial of its terms." *H. J. Heinz Co. v. Labor Board*, 311 U.S. 514, 523.²¹ The recognition of the Union—of the agent authorized collectively by the action of all employees—is the prime and indispensable ingredient in the philosophy and process of collective bargaining.

The "right of employees to self-organization and to select representatives of their own choosing for collective bargaining * * * is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents." *Labor Board v. Jones & Laugh-*

²¹ The *Heinz* case was cited by the Court in *Order of Railway Telegraphers* as indicating "the philosophy bargaining". 321 U.S. at 346, n. 6. *Heinz* is discussed further at pp. 68-69, *infra*.

Id., 301 U.S. 1, 33. The decisions of this Court recognized this "fundamental right" * * * as such in its decisions long before it was given protection by the National Labor Relations Act." *Auto Workers v. Wis. Board*, 336 U.S. 245, 259. This right, the "right to organize and select representatives for lawful purposes of collective bargaining" has had a different history and legal status from the "right to strike". *Ibid.*

The duty to participate in the collective bargaining process is thus different in kind from the duty to refrain from the types of strikes proscribed by the legislature. The nature of the legislatively safeguarded process of collective bargaining is different from that of bargaining powers, just as their legal history and status are separate and distinct.

b. The Employer's Duty to Bargain

Collectively: Section 8 (5) of Wagner

The Wagner Act of 1935 supports the above analysis. In its Section 13 it specified that nothing in the Act should interfere with, limit or restrict the union's right to strike, to use its bargaining powers. Its fundamental purposes were to establish a duty in the employer to permit his employees to organize, if they desired to do so, and to treat with the union as the collective representative of the employees. The emphasis was on the right to organize. The assumption was that private action would do the rest. The intention was to bring the parties to the bargaining table; what happened thereafter was not to be regulated.

This was expressed as follows by Chairman Walsh of the Senate Committee on Education and Labor, in floor debate:

"When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it."

Against this general purpose, the specific provision that refusal to bargain collectively was to be an unfair labor practice was almost an afterthought. There was no such provision in the legislation as originally proposed.

Senator Wagner believed that the employer's duty to participate in the bargaining process, as we have defined it, "clearly implicit in the bill. To attempt to deal with his men otherwise than through representatives they have named for such purposes would be the clearest interference with the right to bargain collectively."²²

* The recommendation that the duty to bargain be made explicit was that of the then Chairman of the old National Labor Relations Board, Francis Biddle. When asked what would constitute a refusal if his proposal were accepted, Chairman Biddle replied, "When they turn them down flat and say, 'I will not deal with the union', that is the most obvious refusal of this, as we frequently have such cases. Or when they string them along without any real purpose or intent of bargaining."²³

²² 79 Cong. Rec. 7660.

²³ 1 Legislative History of the National Labor Relations Act, 1935, published by the National Labor Relations Board, 1939 (hereinafter cited as "Wagner Leg. Hist." 1419).

²⁴ 1 Wagner Leg. Hist. 1455.

The Senate passed the bill with a refusal to bargain provision. The Senate Report included the following:

"DUTY TO BARGAIN COLLECTIVELY

"The fifth unfair labor practice makes it illegal for an employer—to refuse to bargain collectively with the representatives of his employees, subject to the provision of section 9(a);

"The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.

"But, after deliberation, the committee has concluded that this fifth unfair labor practice should be inserted in the bill. It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement."²⁵

The provision in Section 8 (5) was repeatedly described as one which "rounds out the essential purpose of the bill."²⁶ The Section was "intended to imple-

²⁵ Sen. Rep. No. 573, 74th Cong. 1st Sess., 12 (1935), 2 Wagner Leg. Hist. 2312.

²⁶ H. Rep. No. 969, 17, H. Rep. No. 972, 17, H. Rep. No. 1147, 20 all 74th Cong., 1st Sess., 2 Wagner Leg. Hist. 2927, 2974, 3069.

ment the basic philosophy of the act by imposing the duty to engage in collective—as distinguished from individual—bargaining.”²⁷

This provision was consistently interpreted, both administratively and judicially, as embodying “the good faith test of bargaining”—that bargaining must be conducted “in a good faith effort to reach an agreement.”” *Labor Board v. American Ins. Co.*, 343 U.S. 395, 403. This duty “required the employer to negotiate in good faith with his employees’ representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement.”” *Id.* at 402. An employer who genuinely recognized the union as the collective bargaining agent, and proceeded to meet with it in accordance with this test, completely satisfied the duty to bargain collectively.

The Board now suggests that the Wagner Act meant more than this; but the cases cited by the Board, Bd. Br., 19, do not extend beyond the content of the duty to bargain collectively described above, namely, the duty to recognize with the collective representative as the spokesman for all the employees, and to meet with it in a good faith effort to reach agreement.

To take the cases cited by the Board in chronological order, the holding that it is a refusal to bargain for an employer to refuse to sign a written agreement, *H. J. Heinz Co. v. Labor Board*, 311 U.S. 511, is squarely within the above formulation. The Court recognized that “refusal to sign a written contract has been a not infrequent means of frustrating the bargaining process

²⁷ Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1408 (1958).

through the refusal to recognize the labor organization as a party to it and the refusal to provide an authentic record of its terms which could be exhibited to employees, as evidence of the good faith of the employer." 311 U.S. at 523. A "signed agreement" has been "long recognized * * * as the final step in the bargaining process." *Id.* at 525. The employer "by his refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining." *Id.* at 526. It is evident that "the true reason" for the *Heinz* decision is that "Refusal to sign is a negation of the principle of collective bargaining. It is a denial of joint participation in the culminating act of promulgating the wages, hours, and other terms and conditions of employment." Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. R. 1401, 1423 (emphasis in original).

Likewise, *Labor Board v. Crompton Mills*, 337 U.S. 217, involving unilateral changes by the employer, turns precisely on the lack of recognition of the collective bargaining agent, and not on any such all-embracing and indefinable descriptions of collective bargaining as the Board finds necessary to rationalize its action here. "The question here presented," said the Court in *Crompton*, "is whether this employer engaged in an unfair labor practice when, on January 1, 1946, it put into effect as of December 31, 1945, without prior consultation with the bargaining representative, a general increase in the rates of pay applicable to most of the employees who had been represented in

the negotiations." 337 U.S. at 218 (emphasis added). The crucial factor of "without prior consultations with the bargaining representative" was reiterated again and again in the decision, 337 U.S. at 219, 221, 222, 223, 225, and is obviously its basis.

An employer who unilaterally changes working conditions has it within his inherent economic power to make the changes permanent. His motivation is to destroy collective bargaining by discrediting the union, which is the collective bargaining representative, and he has that motivation for maintaining the changes in effect.

There is no parallel on the union side. The Board decision here implies that participating in partial strike activities is a unilateral change in working conditions, and should be condemned on that basis in the same manner as employer's unilateral changes are, R. 31-32. But the differences are obvious. The purpose the union has in mind is reaching agreement in collective bargaining, not discrediting the representatives of the employer. Everyone knows the union's actions are intended to be temporary only, until agreement is reached. In this respect, as the Board noticeably avoids mentioning, there is no difference whatever between a partial and a complete strike. If the Board terminology has any meaning, a complete strike is a complete change in working conditions; the union has rendered *all* the employer's working rules and regulations ineffective. This distortion of the concept of unilateral changes does not serve to give the Board ~~any~~ more power over partial strikes than complete strikes.

It is not all unilateral changes—changes without the agreement of the union—which are unlawful, but only those made without consultation with the union. The *Crompton* opinion expressly points to some circumstances under which an employer could properly make such unilateral changes. 337 U.S. at 224-225. The Board's broadside at unilateral changes as such is aimed at nothing involved in either *Crompton* or this case.

Labor Board v. F. W. Woolworth Co., 352 U.S. 968, a memorandum order principally citing *Labor Board v. Tellitt Mfg. Co.*, 351 U.S. 149, holds that the Board could find an employer who withheld information from the union guilty of refusal to bargain "under the circumstances of this case." * * *. Certainly the withholding of information could provide some basis for a finding that the employer did not in good faith desire to reach agreement under particular circumstances. If the employer is free to withhold wage data which only he is in a position to have, the union can hardly discuss the alleged basis of that data; a time study perhaps—to attempt to prove to a presumably open-minded employer that the rates are as unfair or discriminatory as the union feels they are. It would be impossible to have collective bargaining and to reach agreement.

In *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342, the issue was the specialized one of the substantive scope of the statutory phrase, "wages, hours, and other terms and conditions of employment" * * * under the particular facts of that case. It is impossible to perceive any rational relationship between that issue and

any presented by this case. In any event, however, it is wrong to assert, as the Board does so readily, that *Borg-Warner* did not "rest upon a determination whether or not the employer had a genuine desire to reach agreement." Bd. Br. 19. To hold that the employer cannot "lawfully insist" upon certain clauses "as a condition to any agreement", 356 U.S. at 349, is only the other face of the medallion from concluding that the employer evidenced his lack of genuine desire to reach agreement by insisting on certain conditions to which he felt the union could not possibly agree.

None of these cases is pertinent. There is here no issue as to the scope of bargaining, or the withholding of information, or unilateral action seeking to undermine the bargaining representatives, or refusal to enter into a written agreement. The Union admittedly desired in good faith to reach a written agreement with the Company, recognized the representatives of the Company, did nothing to undermine their standing with the Company, withheld from them no information requested and proposed no bargaining about subjects not clearly within the scope of the Act.

The issue of whether a union bargained in good faith could not arise as a question of a union's committing an unfair practice under the Wagner Act, inasmuch as that statute was directed against employer conduct only. Administratively, however, the Board held in effect that unions were obliged to participate in the collective bargaining process under the same standards as employers. The Board held that the failure of a union to bargain with a good faith desire to reach agreement might excuse the employer involved from any resultant failure to bargain. "Although the Act imposes no

affirmative duty to bargain upon labor organizations, a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the Employer's own good faith can be tested." *Times Publishing Company*, 72 NLRB 676, 683. The Board obviously was looking no further than a union's participation in the bargaining process itself.

In sum, under the Wagner Act, the concept of bargaining in good faith was confined to the bargaining process as defined herein. So long as employers recognized the union as the bargaining representative and met with it seeking in good faith to reach written agreement, their duty to bargain was satisfied. No further regulation of their economic powers was provided under the Act. On the union side, while the duty to participate in the bargaining process was adopted administratively, the Act was not directed against any union conduct and thus not against any exercise of union weapons of economic powers. Indeed, as most consistent with its conception of collective bargaining, Congress provided, in Section 13, that the union's economic powers were not to be interfered with, impeded or diminished in any way by the Board.

c. The Union's Duty to Bargain
Collectively: Section 8 (b) (3)
of Taft-Hartley

The legislative history of Section 8 (b) (3) of Taft-Hartley demonstrates that the purpose of this enactment was simply and solely the achievement of statutory symmetry. From the hearings to the ultimate enactment, this is the only justification offered for making it an unfair labor practice for unions to refuse to

bargain collectively. Once again, the facts are precisely contrary to the assertions of the Board. The only purpose was to achieve symmetry, but the symmetry was "substantive" as well as "textual"; and substantive precisely to the extent that it imposed upon Unions the same "measure of the bargaining obligation" which we have seen above was imposed on employers, "simply a sincere purpose and desire to reach agreement". Cf. Bd. Br., 21. Prior to this case, the Board was able to give "substantive effect" to § (b) (3), in cases involving demands for contract clauses considered illegal under Taft-Hartley,²⁸ without going any further than this test. The precise purpose of Section § (b) (3) was to impose the same legal sanctions upon unions which did not display a sincere purpose and desire to reach agreement as Congress had imposed and was imposing upon such employers.

In the Congressional hearings on the legislation which became the Taft-Hartley Act, virtually the only ground offered for adding a provision making it an unfair labor practice for a union to refuse to bargain collectively was that there was such a provision directed against employers. Congressman Landis, for example, who was the initial witness in the House hearings, stated that "The Wagner Act should be amended to make collective bargaining a two-way street."²⁹ For

²⁸ "In all cases decided by the Board under this section, the allegation that a union had refused to bargain in good faith turned upon the Union's insistence upon an allegedly illegal demand." *Fifteenth Annual Report of the National Labor Relations Board*, 133-134 (1951).

²⁹ *Hearings Before the House Committee on Education and Labor on H.R. 8 and Other Bills* (hereinafter cited as "House Hearings" 80th Cong., 1st Sess. 4 (1947)).

an additional illustration, Charles Wilson, then President of General Motors, testified before the Senate Committee that the obligation to bargain was "one-sided".³⁰ These were typical statements.³¹

In the many expressions going no further than an insistence upon equal treatment for the two sides, i.e., textual symmetry, the only specific suggestions of a practical need for this provision were cases where, in the opinion of three witnesses, particular unions had refused to bargain, in the sense of even participating in meetings with the employer. One witness, for example, complained of unions which refused to deal with small employers until there had been settlement with the largest companies in the industry;³² another complained of a case where the Union had "refused to meet";³³ a third purported to give examples of Unions, all economically powerful, which he alleged attempted to "dictate the terms on which it will consent to negotiate."³⁴ Other than these illustrations of a purported practical need for this provision against unions, every witness who testified on this subject at the Congressional hearings was concerned solely with the theoretical necessity for textual symmetry.

In both House and Senate Bills, there was a provision making it an unfair labor practice for a union

³⁰ *Hearings Before the Senate Committee on Labor and Public Welfare on Amendment to Labor Relations Act* (hereinafter cited as "Senate Hearings") 80th Cong., 1st Sess. 476 (1947).

³¹ e.g. House Hearings, 492, 538, 1378, 2178, 2498-2500, 2529, 2620, 2696, 2725-2726, 2757-2758; Senate Hearings, 845, 963-965, 1797, 2356-2357.

³² House Hearings, 2471.

³³ Senate Hearings, 862.

³⁴ Senate Hearings, 964.

which was the bargaining representative under the Act to refuse to bargain collectively. Both the House and Senate Reports stressed that the same obligation was being extended to both parties. The House Report said of this provision: "The duty to bargain now becomes mutual. This, the committee believes, will promote equality and responsibility in bargaining."³⁵ The Senate Report stated that "the obligation placed upon unions by this provision is the same as that imposed upon employers by Section 8(a)(5)."³⁶ A statement virtually identical to that in the Senate Report is the only comment in the House Conference Report.³⁷

In the debate on the Senate floor, there was further indication of the legislative intention. Senator Morse, who opposed the reported bill and introduced a substitute, declared on the Senate floor that he was in favor of a provision requiring unions to bargain collectively, although it seemed to him that unions would seldom refuse to do so since collective bargaining was, he thought "one of the primary, if not the primary, reasons for their existence."³⁸

Senator Ellender was more explicit as to what he thought the proposed provision meant. He referred to cases in which unions "frustrate the duty to bargain collectively by delivering an ultimatum on a 'take it

³⁵ House Rep., No. 245, 80th Cong., 1st Sess., 31 (1947); 1 Legislative History of the Labor Management Relations Act, 1947 (published by the National Labor Relations Board, 1948) (hereinafter cited as "Leg. Hist.") 322.

³⁶ Sen. Rep., No. 105, 80th Cong., 1st Sess., 22 (1947); 1 Leg. Hist. 428.

³⁷ House Conf. Rep. No. 510, 80th Cong., 1st Sess., 42 (1947); 1 Leg. Hist. 547.

³⁸ 93 Cong. Rec. 1844; 2 Leg. Hist. 982.

or leave it' basis".³⁹ This is the full context of the quotation which the Board presents as illustrating that "Congress found * * * that experience demonstrated that unions * * * may sometimes engage in practices which 'frustrate the duty to bargain collectively,' and that it was necessary to incorporate in the Act a provision against such practices." Bd. Br., 20. There is not the slightest justification for the Board's use of the plural or its implication that some vague, general problem was being discussed. To the contrary, the record shows that the only practice involved was the so-called "take it or leave it" practice, which is a refusal even to meet and negotiate.

Further, Senator Ellender asked himself how bargaining had been conducted by Mr. Philip Murray and the steelworkers' union and he answered in this fashion:

"They simply said, in effect, 'Here is a contract. We want so much pay an hour. We want you to do this, that, and the other. Sign here on the dotted line.' No effort was made to bargain with the smaller companies. Why? Because there was nothing in the act to force those unions to bargain collectively. They could almost get by with murder."⁴⁰

In bargaining with the coal mine operators, according to Senator Ellender, John L. Lewis:

"made a proposal on a basis of 'Take it or leave it.' Of course, that could not be regarded as realistic collective bargaining.

³⁹ 93 Cong. Rec. 4135; 2 Leg. Hist. 1062.

⁴⁰ *Ibid.*

"The same situation existed with respect to General Motors, when the president of the union dealing with it, Mr. Reuther, presented to General Motors the proposition, 'We want a 30-cent increase in wages, and we will not take 'No' for an answer, unless you open your books and show us that you cannot pay it.' That attitude was assumed throughout the collective-bargaining period.

"I say to my colleagues that such action is not collective bargaining. In order to remedy this situation, the pending bill provides that both parties must bargain in good faith."⁴¹

Senator Knowland, in the context of a discussion of the closed shop provisions, had this to say:

"If, instead of negotiating in the true collective-bargaining spirit, a union agent goes to the employer and lays a contract on his desk and says, 'Whether or not a single one of your employees is interested in joining the union, you will sign this, or else,' there is not in that case collective bargaining in the sense that the able Senator from Florida has in mind. It is because of that type of situation rather than the type outlined by the able Senator from Florida that legislation is believed to be necessary at this time."⁴²

His opponent in this colloquy on the closed shop, Senator Pepper, agreed that "we are coming to a recognition of the fact that when any party to a dispute merely takes an adamant position, refuses to hear argument or to consider merit, marches in and throws something down, sits down in a chair and freezes up, and says, 'Take it or leave it,' that is not collective bar-

⁴¹ *Ibid.*; cited in *Textile Workers*, 108 NLRB at 746, n. 10.

⁴² 93 Cong. Rec. 4363; 2 Leg. Hist. 1172.

gaining on the part of either management or employees."⁴³

The same thought was expressed by Senator Hatch in approving the provisions of Section 8(b)(3). He said:

"I approve subsection 3 of section 8 (b) making it an unfair labor practice for a union to refuse to bargain collectively with an employer if the union is the authorized bargaining representative. The whole purpose of the Wagner Act is to bring about bargaining. A union certainly should not be permitted to thwart such a laudable purpose simply by keeping mum until an employer is financially exhausted."⁴⁴

Thus the only specific illustration discussed by the Congress of the standard of a union conduct required by the new Section 8 (b) (3) was that the unions refrain from "take it or leave it" bargaining.⁴⁵ This is the reading of the legislative history taken by the Court below. *Textile Workers*, 97 U.S. App. D.C. at 36, 227

⁴³ 93 Cong. Rec. 4363; 2 Leg. Hist. 1172-1173.

⁴⁴ 93 Cong. Rec. 5005; 2 Leg. Hist. 1479.

⁴⁵ The proposal to make refusal to bargain an unfair practice "is proposed as an exact balance to the provision in the Wagner Act that the employer must bargain collectively and is designed to prevent the development of a 'take it or leave it' attitude by unions or the use of the strike weapon before a genuine effort has been made to negotiate an agreement." Peck, G., *Industrial Relations Policy* 22; see also *id.* at 6 (1947); Reynolds, L. G. *Labor Economics and Labor Relations* 322-323 (2d ed. 1956).

The Board's position in this case is explicitly "that good faith requires something more than a desire to reach an agreement. However, there is no support for this position in the legislative history * * *." Note, *Union Refusal to Bargain: Section 8(b)(3) of the National Labor Relations Act*, 71 Harv. L. Rev. 502, 507 (1958).

F. 2d at 410. The Congressional concern was clearly to require both sides actually to participate in meetings and discussions, with the good faith intention of reaching agreement. Nothing more was intended or provided under the Act. Respondent, as the record demonstrates, fully satisfied the standards which Congress established.

2. A Union's Directing Its Members to Engage in Activities Which the Board Regards as "Unprotected" Is Not Bargaining in Bad Faith and the Board Has No Authority to Forbid Such Union Conduct

As the foregoing discussion demonstrates, the statutory requirement for bargaining in good faith has a purpose and background having nothing to do with the question of whether particular activity by an individual employee is or is not "protected", under Section 7 of the Act, for the purpose of rationalizing Board decisions on reinstatement rights of discharged workers. The above discussion stands or falls on its own merits, without any conceivable relation to the Section 7 issue. In logic, there would appear to be no justification for extended discussion of Section 7. But the Board pins much if not all of its hope in this case on the alleged lack of protection for these activities under Section 7 for the individual employees who engaged in them, R. 31-32, Bd. Br. 10-15, 23-24, 29; so that further discussion seems unavoidable.

Under the Wagner Act, the issue arose in a context utterly removed from any question of a union's bargaining in good faith. It arose in the context of affirmative Board orders to reinstate individual employees, which the Court determined to set aside. It could be held that the Board had no authority to order reinstatement, if it could be said that the discharge

was for reasons other than discrimination based upon the exercise of rights guaranteed the individual under Section 7. Decision in a number of cases thus turned on whether the particular individual acts were within the coverage of Section 7, for the purpose of requiring the employer to reinstate the employees involved.

In those cases, the question was whether such activity by *individuals* was affirmatively *protected* by Congress, so as to immunize the individual employees from discharge. In this case, the issue here is whether such conduct by a *union* may be *prohibited* by the Board. The two questions are quite different. The rights of individuals and the rights of unions are hardly one and the same. *Association of Employees v. Westinghouse Corp.*, 348 U.S. 437; *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 n. 6; just as an individual employment is different from the collective bargaining agreement, *Order of Railway Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346; *J. I. Case Co. v. Labor Board*, 321 U.S. 332, 335-336. Additionally, the question whether an activity is "prohibited" to the Union under Section 8—or neither "prohibited" nor "protected" by the Act—is obviously an independent question from whether it is "protected" for the individual under Section 7. Can the Board seriously contend that it may award itself power it does not otherwise have by deciding that individuals not before it could have been discharged under the circumstances by an employer who did not discharge them?

Originally, under the Wagner Act, the issue was whether the literal terms of Section 7, extending as they did to all "concerted activities," without any qualification or exception, should be restricted to activities otherwise lawful. The Board applied the statute

literally to embrace all activities and was reversed by this Court. The only issue involved was the legality of the conduct, apart from any power or decision of the Board.

In *Labor Board v. Fansteel Corp.*,⁴⁶ 306 U.S. 240, the leading case in time and in legal impact, the Court ruled that "sit-down" strikers were not entitled to reinstatement. (Such strikes were clearly illegal under local law, the Court reasoned; "the strike was illegal in its inception and prosecution." *Id.* at 256. While the Act protected those who engaged in concerted activities, "The conduct thus protected is lawful conduct. * * * There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force or violence in defiance of the law of the land." *Id.* at 255, 257-258. A strike in violation of contract was put in the same category. *Labor Board v. Sands Mfg. Co.*, 306 U.S. 332.⁴⁶

Similarly, in *Southern S. S. Co. v. Labor Board*, 316 U.S. 31, 48, the express ground of refusing reinstatement was that "the strike was unlawful from its very inception." In that case, as this Court recently noted, "Presumed illegality under the mutiny statute was not used to establish a violation of the labor statute. It was relied on to establish an abuse of discretion in giving a remedy." *Carpenters' Union v. Labor Board*, 357 U.S. 93, 111.

⁴⁶ A Board order finding that a Union had violated § 8(b)(3) by a strike in violation of contract was set aside, and the Board's equation between "unprotected" activities and bad faith bargaining criticized, in *International U. of M. & W. A. v. N.L.R.B.*, D.C. Cir., 257 F. 2d 211. The Court, *per* Madden, J., pointed out that "to translate their conduct from an unprotected activity to an unfair labor practice one must find justification in the statute." *Id.* at 215.

The Court was careful to distinguish between the right of the employer not to reinstate the employee and the right of the union to engage in the conduct. At the conclusion of its opinion in *Southern S. S. Co., supra*, the Court expressly declared, "nothing that we have said would prevent the union from striking, picketing or resorting to any other means of self-help, so long as the time and place it chooses do not come within the express prohibition of Congress." 316 U.S. at 49.

These decisions establish that the starting point of the concept of "unprotected" activities was to insure that "unlawful" activities not be affirmatively protected. Activities were unprotected only because they were unlawful under statutes *other* than the Act itself.

Decision turned on whether the conduct was thus lawful or unlawful; only if the conduct were found to be otherwise unlawful was it unprotected. In this case, however, the Board had to disregard this reasoning. Because it was satisfied for its own, subjective reasons that the activity was unprotected, it made "unprotected" the equivalent of "unlawful" and then transformed "unlawful" under other statutes into "unlawful" under the Act.

The Board did not confine the "unprotected" concept to its original function but extended it to justify particular refusals—where the individual conduct was deemed "indefensible", see *Auto. Workers v. Wis. Board*, 336 U.S. at 256—to order reinstatement of employees. In some of these cases, however, decision did not actually rest on any automatic condemnation of "partial strike" activities, but on an appraisal of all facts in the case, and adjudication not essentially different from any other adjudication of whether an em-

ployer was justified under the Act in his action against an employee.

Labor Board v. Electrical Workers, 346 U.S. 464, for example, an oft-used citation for Petitioner, Bd. Br., 13, 15, 23, 29, 33, upholds discharges as "for cause" under Section 10(c) of Taft-Hartley because the "concerted activities" were not "for the purpose of collective bargaining or other mutual aid and protection," as Section 7 specifies. There the leaflet attack against the employer mounted by the participants "related itself to no labor practice of the company. It made no reference to wages, hours, or working conditions," 346 U.S. at 476. That cannot possibly be said of the activities at bar. Indeed, the attempt to secure agreement on bargainable issues was the thin thread by which the Board sought to connect Respondent's conduct with the Act.

Moreover, the Board in *Electrical Workers* made a "factual conclusion that the attack of August 24 was not part of an appeal for support in the pending dispute. It was a concerted separable attack purporting to be made in the interest of the public rather than in that of the employees." *Id.* at 477. No such finding was or could have been made in this case.

In *Electrical Workers* the Court held that the activities were unrelated to a labor dispute, rather than that they were improper or "unprotected" in the context of activities admittedly concerted for the purposes encompassed by the Act. Nothing in the case suggests that the Board could equate "unprotected" for the individual on one hand with "prohibited" for the Union on the other.

That no such equation is possible was expressly recognized by the Board in 1949. Then the Board

advised this Court that the legislative history clearly demonstrated that "Congress deliberately refrained from making all concerted activities which the Board might find unprotected, unfair labor practices." 45d. 1949 Pos. 43. The Board reiterated that Congress meant to deal with such union activities by the private action of employer discipline rather than by any administrative action. "We believe," said the Solicitor General on behalf of the Board, "that the refusal of Congress to define as unfair labor practices all concerted activities which the Board might find unprotected by Section 7 because of their nature or objectives, coupled with the Conference Committee's emphasis upon the right of the employer to discharge for such activity, demonstrates both the intention of Congress that, unless such activities were made independently unlawful on grounds unrelated to labor relations, they were to be dealt with solely through the employer's power of discipline, and its conviction that that power was adequate to put an end to such activities." *Id.* at 11-12. The principal objection the Government raised to permitting States to enjoin such conduct was precisely that "If the state makes an injunctive remedy available to the employer, the employer may resort to it, instead of imposing discipline, to curb work stoppages which he believes unjustified." *Id.* at 37. And if the employer imposes no discipline, it was argued, that would deprive the National Board of its only opportunity to review such conduct, to determine whether or not the individual employees' activity was or was not protected under Section 7.

For the Board argued that it was not precluded from finding that the very activity involved in *Auto. Workers* was "protected." *Id.* at 21-29. "It is clear," the Board

argued, "that the definition of strike adopted by the Supreme Court of Wisconsin, and by the Wisconsin Board, is far narrower than the area of concerted activities held protected under Section 7 of the National Act by the National Board and the federal courts." *Id.* at 57. Obviously, the Board then recognized that the Section 7 issue was completely different from the Section 8(b)(3) issue. Its discussion of the former did not involve the latter. There is no suggestion throughout the entire 1949 Board Brief that there was any authority under Section 8(b)(3) to enjoin this union conduct because it was "unprotected" or because of any of the verbalisms used by the Board in this case.

B. The Definition of "To Bargain Collectively": Section 8(d)

Section 8(d) is the Congressional definition of "to bargain collectively," the refusal of which by a union constitutes the violation of Section 8(b)(3). In the

⁴⁷ See note 7, *supra*.

The recommendations in Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L. J. 319, cited at Bd. Br., 27, n. 9, 30, support the Board's position as of 1949, rather than the Board's present position. The right of the employer to replace partial strikers is recommended as the practical solution of the issues raised by such activities, rather than Board action under the rubric of "protected" or "unprotected." "This solution would preserve a tolerable balance of economic power between employer and employees in case of open conflict without requiring the NLRB and courts to read into 'concerted activities' moral and economic limitations for which they lack accepted standards. Protection would be denied only to violence, mass picketing and related misconduct which both our labor laws and general criminal statutes have uniformly condemned. * * * it would seem more consistent with the philosophy of section 7 to hold that the federal right to engage in concerted activities protects strikes, boycotts and picketing whose purpose is to achieve any objective of collective bargaining which has not been outlawed by the state." *Id.* at 339, 344.

Wagner Act, there was no statutory definition of collective bargaining. According to Petitioner, Section 8(d) was intended to recognize or expand a broad, if not unlimited, power in the Board to enforce its own notions of good faith collective bargaining. Bd. Br. 17-20. This view is opposed to both the purpose and the language of Congress.

Contrary to the Board's suggestions that its own assertions of power under the Wagner Act were recognized, broadened or made unlimited in Taft-Hartley, the legislative history clearly reveals that the Congressional purpose towards the Board in enacting Section 8(d) was to curtail the Board's power in refusal to bargain cases, inhibiting its authority to govern the actions of the parties during the course of bargaining. To be sure, the Congress directed Section 8(d) against unions also, imposing specific limitations on the right to strike. But there is no mistaking the Congressional fire aimed at the Board.

In both the House and Senate Bills, definitions of "collective bargaining" were provided which both limited previous decisions of the Board and restricted the right to strike. Section 2 (11) of the House Bill was much more drastic than the Senate proposal.⁴⁸ Section 2 (11) contained a detailed description of the collective bargaining procedure which had to be followed for good faith bargaining, including such prescriptions as the number of meetings within a stated period. It also specified the subjects which could be discussed in the collective bargaining procedure, excluding a number of subjects which the Board had held bargainable, such as

⁴⁸ See H.R. 3020, 80th Cong., 1st Sess., as reported, and as passed House, 6-10 (1947); 1 Leg. Hist. 36-40, 163-167.

welfare funds, pensions and checkoffs. In addition, it included, as a condition for any lockout or strike, a procedure for notifying the employees of the employer's last offer and for conducting a secret ballot as to whether such offer should be rejected and a strike called. The Senate proposal of Section 8 (d), substantially what was ultimately enacted, also defined collective bargaining, but not in such close detail, and it imposed limitations on the right to strike, in the form of notices to state and federal mediation services and a 60-day cooling-off period.⁴⁹

The Conference Committee Report described the Senate proposal in these words:

"The Senate amendment did not, in the definition section, contain any definition of 'collective bargaining,' but did contain (Sec. 8(d)) a provision stating what collective bargaining was to consist of for the purposes of section 8. It was stated as the performance of the mutual obligation of the parties to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or with respect to the negotiation of an agreement, or with respect to any question arising thereunder; and the execution of a written contract incorporating any agreement reached if desired by either party. This mutual obligation was not to compel either party to agree to a proposal or require the making of any concession. Hence, the Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as

⁴⁹ See S. 1126, 80th Cong., 1st Sess. as reported, 16-18 (1947); and H.R. 3020, as passed, Senate 80th Cong., 1st Sess., 84-86; 1 Leg. Hist. 114-116, 242-244.

a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties.”⁵⁰

The Conference Committee then reported that the Conference agreement followed in general the provisions of the Senate proposal, with certain clarifying changes.

In general, Congress clearly and expressly provided a definition of collective bargaining, and intended that this definition govern the obligations of employers and unions to bargain collectively. As the Conference Report states, this provision sets forth what “collective bargaining was to consist of for the purposes of Section 8.” “Since § 8(d) defines the duty to bargain collectively, a violation” of that provision is what “constitutes a refusal to bargain, an unfair labor practice for employers, § 8(a)(5), and unions, § 8(b)(3).” *Labor Board v. Lion Oil Co.*, 352 U.S. 282, 285.⁵¹

The record demonstrates what the Board conceded, that Respondent complied with the specific definitions set forth in Section 8 (d). There can be no doubt that Respondent met with Prudential; that it conferred in good faith, so far as its conduct and purposes in the meetings themselves were concerned; that it genuinely desired to come to a written agreement and in good

⁵⁰ H. Conf. Rept. 510, 80th Cong., 1st Sess., 34 (1947); 1 Leg. Hist. 538.

⁵¹ “The effect of § 8(b)(3) is to make it an unfair labor practice for a union, to call a strike before it has satisfied its obligation to bargain collectively.” Teller, *Labor Disputes and Collective Bargaining* (1950 Supplement) 107.

faith recognized and dealt with the representatives of the employer; and that it gave the specified notices.

The requirement for notices was directly aimed at one particular less-than-complete strike tactic, "quickie" strikes. "A reading of the committee reports and the floor debates alone could well lead to the conclusion that both the sponsors and the opponents of the bill saw in § 8(d)(4) no more than a means for preventing 'quickie' strikes by requiring a 'cooling-off' period which would not in any circumstances exceed 60 days." *Labor Board v. Lion Oil Co.*, 352 U.S. 282, 292; *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 288. The Congressional decision to require a cooling off period for one particular less-than-complete strike tactic hard authorizes the Board permanently to freeze and prohibit all such tactics. The only reasonable inference is that Congress meant to permit such tactics to the extent it did not specifically regulate or prohibit them; see the discussion of § 8(b)(4), pp. 93-96, *infra*.

The Congressional intention in Section 8(d) to limit the Board's authority is reflected in the specific provision that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." Enacted in response to "the fear * * * expressed in Congress that the Board 'has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make,'" this provision makes it quite "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in

judgment upon the substantive terms of collective bargaining agreements." *Labor Board v. American Ins. Co.*, 343 U.S. 395, 404.⁵²

In this case, the Board clearly appears to have disregarded this specific Congressional limitation on its authority. To dictate when unions must either strike completely or capitulate at the bargaining table is very close to the line drawn by Congress and by this Court applying the Congressional mandate, if, indeed, it does not cross that line. "For the government to tell the parties how they must conduct themselves in collective bargaining negotiations would seem to lead inevitably to weighting the scales in favor of one side or the other, for tactical maneuvers influence the processes of persuasion especially where economic power is a primary factor. * * * The effort to regulate the manner in which collective bargaining negotiations are conducted can easily influence the substantive issues."⁵³

⁵² "It appears that, with few exceptions, the employer's duty to bargain collectively was not invoked once joint dealing had got under way. As a matter of fact, the principal duty of the National Labor Relations Board under Section 8(5) of the Wagner Act was to assist and to advise the parties in the inauguration of joint dealings where they had not previously been practiced. The tendency to require employers to make a counter-proposition caused much of the demand for a bi-lateral Section 8(5) and the statement in the Taft-Hartley Act that no concessions need be made." Taylor, G. W., *Government Regulation of Industrial Relations*, 284, n.55 (1948).

In the *American Ins. Co.* case itself, the Board "was reversed for the reason that it had undertaken, in the Court's view, to evaluate the conduct of the parties in the collective bargaining process." Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 Mich. L. Rev. 807, 825 (1959).

⁵³ Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1440, 1441 (1958). "Such phrases as 'abuse of bargaining powers' and 'balanced bargaining relations' have no settled meaning." *Id.* at 1435.

At the very least, Section 8 (d) was intended to be a contraction rather than an expansion or recognition of the previous Board decisions on good faith bargaining. The Congressional purpose was not extended beyond the bargaining "process" any more in Taft-Hartley than in the Wagner Act. "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts," this Court declared during its last Term,

"is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby, to minimize industrial strife. See *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45; *Labor Board v. American National Ins. Co.*, 343 U.S. 395, 401-402. Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed." *Teamsters Union v. Oliver*, 358 U.S. 283, 295.

It was "the good faith test of bargaining"—"collective bargaining in the hope that agreements would result," *Labor Board v. Truitt Mfg. Co.*, 351 U.S. 149, 152—which "was retained and written into Section 8 (d) of the National Labor Relations Act." *Labor Board v. American Ins. Co.*, 343 U.S. 395, 404. As we have seen, the applications of that test constitute no basis or precedent for any effort at regulating bargaining powers or prohibiting any conduct which does not undermine the status of the collective representative or demonstrate a lack of good faith to come to a written agreement. Accordingly, Section 8(d) demonstrates that this Board order lacks any foundation of authorization from Congress.

**C. Specific Union Less-Than-Complete Strike Activities
Prohibited: Section 8(b)(4)**

In the Taft-Hartley amendments, Congress expressly recognized that there were other Union activities and weapons besides the complete strike. It prohibited Unions in effect from using any economic pressures for certain specified purposes. Section 8 (b) (4) makes it an unfair practice for a union "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is" as specified in four subsections, which dealt, in brief, with secondary boycotts (subsection (A)), jurisdictional disputes (subsection (D)), and requiring collective bargaining where the particular Union was not certified (subsection (B)) or where another Union was certified (subsection (C)).⁵⁴ In this case, the refusal to perform certain services was not for any of the proscribed purposes. The sole object was to obtain a satisfactory agreement with the employer for employees for whom Respondent was certified bargaining representative.

⁵⁴ Within the past few months, Congress has amended § 8(b)(4) and defined additional union conduct as unfair labor practice. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. 86-257, 86th Cong., 1st Sess., 73 Stat. 519, Section 704, 73 Stat. 542, 29 U.S.C. 158; but none of the "harassing tactics" used by Respondent was made unlawful.

⁵⁵ In the Board's *Textile Workers* decision, "the unions were held to have refused to bargain because their tactics were deemed improper, although Congress had deliberately refrained from condemning such tactics as illegal." Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 Mich. L. Rev. 807, 832 (1959) (emphasis added).

On familiar principles of reasoning and statutory construction, it must be judged that Congress meant to prohibit only what is actually prohibited, and meant to permit what it did not prohibit. *Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62, 73; *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-376. This conclusion is reinforced in this case by legislative history and the decisions of this Court.

The legislative history reveals that there was a specific proposal to make at least some of the union conduct here involved unfair labor practice; and that Congress rejected it. In the House Bill, as proposed and as passed by the House, Section 12(a)(3) made it an unfair practice for a union to do any of the following: "Calling, authorizing, engaging in or assisting (a) * * * any concerted interference with an employer's operations conducted by remaining on the employer's premises." Section 12 was entitled "Unlawful Concerted activities."⁵⁵ In accordance with the specification of unlawful concerted activities, Section 12(e) in the House Bill prohibited Board action interfering with, impeding or qualifying the right "to strike or to engage in other lawful concerted activities."⁵⁶ This approach, which closely resembles the Board's in the instant case, was discarded in conference.

Congress regarded the present provisions of Section 8(b)(4) as covering all the union conduct which Congress intended to outlaw. In referring to these provi-

⁵⁵ H.R. 3020, 80th Cong., 1st Sess., as reported and as passed House, 48; 1 Leg. Hist. 78, 205. Section 12 (b) permitted civil suit for damages because of unlawful concerted activities. *Id.* at 49, 79, 206.

⁵⁶ H.R. 3020, 80th Cong., 1st Sess., as reported, and as passed House, 50; 1 Leg. Hist. 80, 207.

sions, the detailed analysis of the conference agreement submitted by Senator Taft stated that "In the House Bill such activities as well as a number of other kinds of concerted action, were made unlawful and excepted from the provisions of the Norris LaGuardia Act. * * * At the insistence of the Senate conferees the House managers agreed to eliminate these provisions from the conference report." ⁵⁷ Further, in referring to Section 303, permitting civil suit on the basis of the activities proscribed in 8(b)(4), the House Conference Report stated that "A comparable provision was contained in the new section 12 of the National Labor Relations Act dealing with unlawful concerted activities." ⁵⁸ Accordingly, Congress was aware that Section 8(b)(4) was restricted and not comprehensive, and did not cover all the union activities which had been proposed for prohibition or been prohibited in the House Bill. It was a deliberate choice by Congress that the activity involved here not be prohibited under Section 8.

Again, the Board was in exact agreement with this conclusion in 1949. Then the Board submitted that "Congress, after considering many possibilities, carefully selected those types of conduct which it desired specifically to protect or prohibit and the remedies it wished to be followed, and that its failure to go further was a deliberate choice that there should be no further regulation in the field of labor relations in interstate commerce." Bd. 1949 Pos. 6-7; 3-4. Congress made the "decision after careful deliberation that only certain acts and practices were to be outlawed * * *." *Id.* at 12.

⁵⁷ 93 Cong. Rec. 6443; 2 Leg. Hist. 1540.

⁵⁸ House Conf. Report No. 510, 80th Cong., 1st Sess., 67 (1947); 1 Leg. Hist. 571.

This Court has sustained the inference that Congress meant to permit the union activities not specifically prohibited under Section 8. As to picketing, for example, the Court held that "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner v. Teamsters Union*, 346 U.S. 485, 499-500, quoted approvingly in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 475; cf. *Carpenters' Union v. Labor Board*, 357 U.S. 93. The Court below must be affirmed in its judgment that the Board could not find statutory violation from use of "harassing activities" because "Aside from some specified conduct, such as jurisdictional strikes and secondary boycotts, we do not find that Congress limited the use of economic pressure in support of lawful demands." *Textile Workers*, 97 U.S. App. D.C. at 37, 227 F.2d at 411.

D. The Free Speech Activities: Section 8(c)

Here is another point where legal decision virtually is as simple as contrasting the Board decision with the plain words of the statute. The Board found, as part of its undifferentiated summary of all the activities it found distasteful as "harassing," that the agents here had "picketed, demonstrated, and distributed leaflets in front of the home, district and detached offices on specified days; distributed leaflets each day to policyholders and others on the agent's debit; secured

policyholders' signatures on petitions directed to the Company on Respondent's behalf." R. 28-29. These activities obviously were no more and no less than "The expressing of * * * views, argument, or opinion, or the dissemination thereof * * * in written, printed graphic, or visual form," precisely the activity which Section 8 (c) of the Act expressly provides "shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." The record makes evident that there were no such threats or promises. The Board's Brief inferentially admits this. Bd. Br. 15, n. 1. The Board decision and order thus flagrantly violates the statute.

The Brief attempts to short-circuit recognition of this obvious statutory excess on the part of the Board by saying that the activity is "unprotected" because "the picketing was engaged in during working time." Bd. Br. 15, n. 1. No discussion is attempted and no authority is cited. The comment is obviously fallacious.

Section 8 (c) precludes the Board from applying its notions of "unprotected" to these activities. "The remedial function of § 8 (c) is to protect noncoercive speech by employer and labor organization alike in furtherance of a lawful object." *Electrical Workers v. Labor Board*, 341 U.S. 694, 704. The section specifies that no expression of views without threat or promise shall be an unfair labor practice or be taken as evidence of unfair labor practice. There is no equivocation, no qualification. Congress meant to immunize such activities from the Board.

It is the most obvious and deliberate evasion of the plain Congressional intention and provision in this Section for the Board to assert authority to outlaw certain speech activities, not a threat or promise, as "unprotected" or on any other basis. Congress has declared that the Board shall not accept such activities even as evidence of unfair practice, under any circumstances; the Board cannot validly contend that such activities may be unfair practices if the Board merely calls them "unprotected."

If the Board is to be heard to argue that the picketing occurred "during working time," it should be made to specify what the working hours of these employees are. To do so it would have to contradict its own witness who testified that the very nature of the job precluded setting a number of hours or definite working hours, R. 57-60. Moreover, it should explain why the hours which are generally considered lunch hours should be considered "working time" for this purpose. There is absolutely no hint in the record that the total working time was reduced, either in the aggregate or for any particular agent, because of the free speech activities.

The Board's order and these arguments offered therefor make no distinction or separation whatever between these activities expressly sanctioned by the Congress and any of the others. To the Board all the Union activities were just one integrated entity of "harassing tactics." The Board clearly considered that its order would stand or fall as a whole; that either all the activities were permissible under the Act or none. Accordingly, a legal defect as to any of the Union activities infects and destroys the legal basis as to the entire order. The Board's patent failure to comply

with Section 8 (c) require that the Board order be set aside in its entirety.

E. The Scope of the Board's Order

The scope of the Board Order is a further demonstration of the utter disregard manifested by the Board in this case for the plainest limitations on its authority. The Board order enjoined the use of each of the union activities engaged in for all time for the purpose of obtaining agreement, whatever the particular circumstances. It enjoined also any "other unprotected conduct" and "any like or related conduct in derogation of its statutory duty to bargain." R. 35. This places on Respondent the duty of knowing what "unprotected" may mean, and what "derogation of its statutory duty to bargain" may mean, upon pain of contempt. It is manifestly impossible for Respondent, in its future bargaining, to know precisely what picketing or other conduct the Board will consider illegal. In addition to the injunction, and despite the absence of any Board reference to evidence of bad faith other than the "harassing tactics" themselves, the Board required the posting of notices. In all these respects the Board Order here transgressed the limitations on the Board's authority defined by this Court.

Where there is only "one item" of unfair practice, "there appears no reason for enlarging the scope of the enforcement decree beyond that feature, and little, if any, need for orders requiring either specific affirmative action to be taken by the employer or the posting of any notices by it." *Labor Board v. Crompton Mills*, 337 U.S. 217, 226. The Board is not "justified in making a blanket order restraining the employer from committing any act in violation of the statute * * *." *Labor*

Board v. Express Publishing Co., 312 U.S. 426, 433;
May Dept. Stores v. Labor Board, 326 U.S. 376, 392-
 393; *J. I. Case Co. v. Labor Board*, 321 U.S. 332, 341-
 342.

IV. THE BOARD IS LEGISLATING GENERAL POLICY IN THIS CASE. ITS ORDER IS ARBITRARY AND CANNOT BE SUSTAINED ON THIS RECORD

A. The Board's Order Has No Basis Other Than the Arbitrary Presumption That a Union's Use of Tactics the Board Considers "Harassing" During the Course of Negotiations Is a Per Se Violation of Section 8(b)(3)

To this point, we have been discussing whether the Board may enjoin "partial strike" activities, under the Act. We have established that it has no such authority. Respondent submits that the only proper way in which the Board could obtain any such authority is by Congressional legislation. Instead, however, the Board is seeking to usurp the legislative prerogative, and to enact general legislative policy in this case under the guise of an administrative adjudication.

A genuine adjudication involves a consideration of all the particular facts of record. It requires the appraisal of the specific defenses offered. It involves the application of established legal principles to the particularized case. In this case, the Board did none of these things. All it did was to enforce its preconceived general policy that it would enjoin any less-than-complete strike activities carried on during the period of collective bargaining. For the sake of adhering to its general, legislative policy, the Board here was driven to the extreme of disregarding and perverting the record and otherwise betraying its quasi-judicial duties.

This Board decision is divorced from any fact of record other than the fact that the Union engaged in

activities the Board considered "harassing" during the course of contract negotiations. That solitary fact was absolutely conclusive. The Board considered nothing else—neither the record of the actual bargaining which demonstrated good faith affirmatively; nor the actual impact, if any, of the Union activities upon the employer; nor the advance knowledge the employer had of these activities, enabling it to plan accordingly; nor the relative bargaining strength of these parties; nor the bargaining power realities in the insurance industry and between these particular parties; nor the relative advantage or disadvantage of these activities, as compared to a total strike, in these particular circumstances; nor the utter lack of distinction between a partial and a complete withdrawal of labor, so far as concerns the intention to affect contract negotiations. None of this was actually considered. The cold, analytical truth is that there is no bridge of rational argument or review of this record—nothing other than the arbitrary, automatic, *per se* connection—between this Union's engaging in less-than-complete strike activities, and the Board's judgment of statutory violation.

Moreover, in addition to refusing to decide this case on its own facts, the Board in principal part went so far as to decide this case in effect on the basis of the facts of other cases. Specifically, the Board, in both its decision and its brief, relies on both the *Auto. Workers* case and its own decision in the *Textile Workers* case, although the facts there relied on were shown not to exist in this case. To briefly presage what will shortly be discussed more fully, in both those cases the factors deemed decisive included actual impact on the employer, failure to notify the employer in advance and failure to advise the employer of the specific demands

the Union was seeking to enforce.⁵⁹ In this case, as we have seen, the Board declared the first irrelevant; and it completely disregarded the distinctions that in this case, the employer did have advance notification and did know precisely what concessions were being demanded by the Union. The Board decision in this case is alien to the record in this case.

That is the reality of the Board position. By no means is it openly expressed. How could it be defended if it were? Thus the Board in its decision puts down the following words: "we rely on the harassing tactics solely as evidence of the Respondent's bad faith dealings with the Company and not as independently constituting unfair labor practices." R. 31, n. 9. The bare

⁵⁹ In *Auto. Workers*, the Court described the union activities as follows: "It was an essential part of the plan that this should be without warning to the employer or notice as to when or whether the employees would return. * * * The employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them. * * * It was, and is, candidly admitted that these tactics were intended to and did interfere with production and put strong economic pressure on the employer, who was disabled thereby from making any dependable production plans or delivery commitments." 336 U.S. at 249.

In *Textile Workers*, the Board relied upon the facts, which it did find, and evidently could have found on that particular record, that "These unprotected tactics interfered with production and put strong economic pressure on the employer who was thereby disabled from making any dependable production plans or delivery commitments. Moreover, the employer was not informed of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them." 108 NLRB at 746. Further, the Board said, "we are of the opinion that the failure to communicate the purpose of the harassing tactics is, in the context of this case, further evidence of the Respondents' unwillingness to maintain an environment which would further reasoned negotiations." *Id.* at n. 10.

fact, however, is that the Board makes this recital while not citing any other evidence whatsoever for the conclusion of bad faith. Surely the reality governs and not the standard, ritual recitals of the Board. A "board cannot enlarge the powers given to it by statute and cover a usurpation by calling it" by a different name from that which the facts demand. *Waite v. Macy*, 246 U.S. 606, 608-609 (*per* Mr. Justice Holmes).

Likewise, the Board's Brief is nothing if it is not a paeon to administrative balancing and expertise. This has an attractive ring, superficially, for the general, theoretical proposition is indisputable that an administrative decision reflecting an expert balancing of all the facts of record is entitled to great weight on judicial review. In this particular case, however, the Board expressly held certain facts to be irrelevant; and did not consider all the facts of record. What it did not consider it obviously could not balance. The Board did not consider the affirmative defense of the Union that the bargaining record proved it had bargained in good faith.

The Board did not consider that the Union had proved it had in fact engaged at bargaining table in "the give and take of personal conferences with a willingness to let ultimate decision follow again opportunity for the presentation of pertinent facts and arguments," *N.L.R.B. v. Jacobs Mfg. Co.*, 2d Cir., 196 F.2d 650, 683, which the Board accepts as denoting good faith bargaining. Bd. Br. 24. Accordingly, if there was any balancing, it excluded one side of the adjudicative scales.

The Board assumed, it did not find, the facts of record. It assumed the facts of other cases to be the

facts of this case. Instead of reviewing the facts of this case, the Board simply disregarded whatever facts did not conform to its prejudgments, and imagined that the record contained whatever minimum it regarded as necessary to a decision against the Union.

The Board equated its decision that it might have power in *some* case to find bad faith bargaining where a union used less-than-complete strike tactics to a determination that it had to find violation in *all* such cases. To ask whether a finding of violation was justified in this particular case did not occur to the Board. There is no possibility of any exception to the Board's presumption of general rule. In the Board's view, there is no possible defense, no valid justification. If these tactics are used during bargaining for the purpose of obtaining agreement, the union is automatically bargaining in bad faith. To permit adjudication on any such wholesale, *per se*, basis is a denial of due process as well as a violation of the Act.

B. The Real Facts of This Case Are Contrary to Those Arbitrarily Presumed by the Board

The Board's decision here is egregiously arbitrary, not only because the Board did not consider the entire record and thus did not realize that there was no factual support for its presumptions and conclusions, but even further, because the facts of record are contrary of those presumed by the Board. The Board was not merely passively declining to see whether its findings were supported by the record. It had actively to remove from its considerations the real facts of this case which contradicted the assumptions essential to its decision.

Specifically, the Board relied on a general presumption exactly contrary to the particular facts of this case.

as to each of the following: (1) advance knowledge by the employer of the activities involved in this case; (2) economic harm to the Union and to the individual employees participating; (3) relative economic damage to the employer; (4) the relative economic strength of the two sides to this bargaining; (5) the need for these tactics as a bargaining weapon in this particular situation; (6) the history and traditions of collective bargaining in this industry and between these parties; and (7) the impact on this particular bargaining.

1. Advance Knowledge by the Employer

The administrative finding of fact,⁶⁰ based on the stipulation of the parties, was that Prudential had advance knowledge of each Union activity. R. 20-21, 60. In any event, there was a pattern of consistency and regularity in the activities directed by the Union. The Company knew what was going to occur in advance. Consequently, it knew what it had to do and planned, or could have planned, accordingly.

Obviously, this union conduct met the test of affording the other side an opportunity for advance

⁶⁰ In the discussion which follows, the administrative findings in this case are taken as the particularized findings of fact made by the Trial Examiner. The Board decision reads, "the Board adopts only those findings and conclusions of the Trial Examiner which are consistent with the findings and conclusions herein-after made." R. 27. Because of the paucity of particular findings made by the Board, the generality of its own findings and conclusions, and its reliance on presumptions applicable whatever the particular facts, it is submitted that all the particularized findings of the Trial Examiner, referred to in this Brief, are consistent with the Board decision, and hence may fairly be cited as the administrative findings in the case.

There is evinced in the Act "a purpose to increase the importance of the role of examiners in the administrative process." *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 495.

planning, the test which the Board submits is appropriate to a "strike." Bd. Br. 29. Further, as already noted, the Board believed itself justified here by cases in which there was no advance knowledge.

2. Economic Harm to Employees and to Union

The employees in this case were compensated entirely on a commission basis, except for the special allowance of \$4.50 per week, which was commonly accepted as partial reimbursement for necessary expenses, principally automobile expenses, involved in operating the debit. Where there was no work done, there was no commission received.

Other than the refusal to write new business, there was no reduction of normal operations in this case, so far as concerns the relationship between the agent and the Company on the one hand and the policyholder on the other. The administrative finding was that "There is no evidence in the record to show that the servicing of policyholders was in the slightest degree affected—as presumably would have been the case in a full strike." R. 21-22. In fact, these agents did their collection and servicing work to the regular and normal extent. They were compensated for the services they performed, but, under the commission scales, only to the extent that those services were actually performed.

To the extent that these agents wrote no new business, they received no new business commissions. Their loss of these commissions was direct and complete. As these commissions constitute the greater portion of the average agent's compensation, participation in this phase of the Union's program entailed a most severe and direct loss of person income for the agents involved.

Furthermore, as far as the Union is concerned, the revenue deriving from the check-off clause was automatically terminated upon the expiration of the contract and was thus completely unavailable during the period of "work without a contract." The practical impact of this can be imagined and is confirmed by the consistent references to manual dues payments, as well as additional voluntary contributions, in the Union's letters.⁶¹

There is thus no foundation whatever for the presumptions in the Board's decision and the assertions in its Brief that there was no meaningful economic pressure on the Union or on these employees to reach agreement. It is inaccurate and misleading to say, as the Board did in its decision, that these employees were enabled to "accept compensation from their employer without giving a regular return of work done * * *." R. 32. The undeniable fact is that the compensation exactly mirrored the work done. No performance, no compensation.

Likewise, the discussion of relative economic damages in the Board's Brief, while carefully phrased in generalities so as to be unexceptional theoretically, has no relationship to this record. There is no basis for any implication that in this case utilization of these activities "cost one party little or nothing" or imposed "no substantial economic constraint to come to agreement except upon its own terms." Bd. Br. 28. The Brief at least tacitly recognizes what the Board itself refused to consider or mention in its decision, that these employees did lose new business commissions when they

⁶¹ See, e.g., G. C. Exhs. 33 H, Q, U, W, Y, Z, BB, DD, EE, GG, H, KK-XX, QQ, UU, VV, YY; Tr., 82-90.

wrote no new business. But in commenting on the fact that these men did continue to receive their other compensations, the Brief fails to mention the only reason for this, namely, that they continued to perform all their other duties. Further, the Brief asserts that "The employees' partial loss of commissions is hardly to be compared with the total loss in pay involved in a strike," *Id.* at n. 11, without any explanation or justification. The truth looks in the opposite direction. Exactly as in a complete strike, there was a direct relationship between work and pay; to the extent there was no work, there was no pay.

3. Relative Economic Damage to the Employer

The administrative findings, as we have seen, show that the economic operations of Prudential continued normally in every aspect of the business, other than the writing of new business; and the compensation for writing new business was entirely on a commission basis. R. 21-22. Accordingly, the damage to Prudential operations was obviously less than it would have been in a completely effective strike. Instead of having all its regular collection and servicing work performed, Prudential would have had none in a completely effective strike.

In the Board's view, the Company at any time could have discharged the employees participating in these activities. In effect, if that is true, Prudential could have converted this situation into a Board-recognized "strike," at its own option. Its own self-interest was certainly the sole standard when Prudential weighed its alternative courses and decided it preferred the maintenance of the "work without a contract program" to the no-work of a completely effective strike. Had

Prudential considered that the relative damage to its operations and bargaining power could have been changed to its benefit by transforming the situation into such a "strike," there can be no doubt whatever of its course.

In any event, there was no evidence introduced even tending to suggest that Prudential was or could have been more damaged by these activities than by a completely effective strike. No such finding was made by the Board.

To reiterate, the Board expressly disclaimed the need for it to be concerned with the impact on the employer. Whatever the pertinent facts, it would have made no difference to the Board.

4. Relative Economic Strength

The relative economic strength of the two sides of this bargaining could hardly be more removed from the detached conception of theoretical equality upon which the Board position is based. It is not only a question of the David and Goliath relative size of the two parties. It is also a question of the degree of organization, and ability to achieve the results normally achieved by a completely effective strike.

In this case there was no union security clause, and a substantial minority of the unit was not organized. G.C. Exh. 8; Tr. 52-57, 67. To think here in terms of automobile plants or other powerfully organized situations is most unrealistic. To assume that this relatively small Union could enter the same arena of raw economic power (as opposed to rightness and sincerity of purpose, human zeal and devotion, and the sense of union) with Prudential, whatever tactics the Union

used during negotiations, requires a complete distortion of the generally used indicia of economic power — assets, income, number of employees, and so forth. And to declare solemnly that this Union not only attained Prudential's economic power but overbalanced it solely because of "the work without a contract program" is to import fiction or delusion into the Board's decisional processes.

The plain fact is that the "work without contract" program failed. Respondent was forced to accept a clause which it detested, a clause not different in principle from the Company demand. If there were any substance or reality to the Board's preconceptions that "partial" strike activities are unfair or unhealthy because they are universally so one-sided and overpowering, how could Respondent's activities in this case have fallen so markedly short of attaining their bargaining goal?

5. Unique Nature of Board-Preferred "Strike" in Insurance Industry

Tactics such as those used in this case are necessary in this industry, whatever may be situation in other industries. In the insurance business, the pressure on the employer as a result of a Board-preferred "strike" would appear to be not as great as the case of an automobile or textile plant:

For one thing, the insurance industry cannot be compared to a manufacturing plant. As there is no physical product here, a completely effective strike could not possibly result in a cessation of that physical production which the employer requires. Here there is no centralized physical plant from which production flows; there are no assembly lines which can be stopped

or delayed at any point. An insurance company can continue to do business by mail. Prudential has thousands of field offices, including many employees not in the Union. The District Agents for whom Respondent bargains are not even the Prudential's sole agency force—there is an army of Special Agents, general agents, brokers, and other representatives who are eternally competitive and ready to step into any opportunity yielded by a District Agent.

In addition, insurance companies are in a unique position to profit from a strike. Unlike any other employer, the insurance company's reduction in liabilities during a strike may exceed its loss of income. Should the policyholder stop paying his premium, the Company would retain all the premiums which it has received; but the obligation corresponding to those premiums would be cancelled. The potential liability of the Company is thus reduced. From the viewpoint of the Company in the short run, it is the equivalent of a windfall; these are funds which the Company now has available for its own purposes, and without any expenditure on its own part.

Furthermore, the insurance policyholder is subject to far more direct and immediate pressure to contribute to the employer during a completely effective strike of Agents than other consumers. Until a strike in the manufacturing plant has been settled, for example, consumers can continue to use the products they have, such as suits of clothing, which have been purchased previously. Of they can merely buy a competitor's product if the strike is not industry-wide. But the insurance policyholder must continue his premium payments to maintain the value of his investment. If he

has loan or cash values, or any similar right in his policy, there is a substantial economic penalty against him if the policy lapses. It takes considerable time to obtain these special values in any policy, and these values increase the longer the policy is continued in good standing. These values are not replaceable; they are not attainable for the same price. In fact, insurance protection for a particular policyholder may no longer be attainable at any price, because of health changes since the policy was issued. Accordingly, the policyholder may feel impelled to mail the premium to the Prudential office—which maintains the policy in effect, Tr. 485-486—if the Agent does not visit him to make the collection. For the insurance consumer, support of the Union entails genuine personal sacrifice, not merely postponing or eliminating the consumption of a particular good.

Both Prudential and the Union were fully aware that the nature of this industry makes a complete strike relatively less effective and more vulnerable than in industry generally. If there is to be collective bargaining in the insurance industry with a union free to utilize effective weapons, the union weapons must include something other than and additional to a complete strike.

6. Bargaining History and Tradition Between These Parties

For insurance agents, collective bargaining is a post-Wagner Act phenomenon. When that Act was passed, there had not been any efforts to organize insurance agents. Evidently "the philosophy of bargaining as worked out in the labor movement of the United States" did not extend to these employees in 1935. If the Wagner Act was meant to freeze that philosophy

into the law, as the Board sometimes appears to contend, this Union and this bargaining are illegal *ab initio* and should long since have been enjoined.

When it was achieved, collective bargaining for insurance agents naturally adapted itself to the problems involved in the particular industry and bargaining unit. The bargaining power realities were as obvious to the parties as they have been disregarded by the Board. From the first, activities which the Board now brands as "harassing" had to be and were utilized by unions for effective organization and representation. The parties recognized that other union activities besides the complete strike were peculiarly applicable to this industry. When the parties themselves defined "strike," as they did in effect when they bargained for a no-strike clause, they expressly included these activities.

As set forth above, pp. 7-8, *supra*, these parties provided that, during the life of the contract, there shall be no "mass late reporting, mass blank production weeks, or slowdown of duties or production, or picketing." This is in the very same provision and sentence which refers to "strike." To the parties complete and partial strike tactics were one.

What the parties have joined together the Board may not rend asunder. Such clauses are typical of collective bargaining agreements throughout the industry, not merely those between these parties. The Board should not make assumptions contrary to "common collective bargaining practice in the industry"; the Board "was not empowered to disrupt collective bargaining practices." *Labor Board v. American Ins. Co.*, 343 U.S. 395, 408.

If the Company believed that this clause was necessary to prevent the use of such tactics during the life of the contract, it must obviously have believed that such tactics could be used, once the contract had expired. The Union bargained, likewise, on the basis that such tactics could be resorted to when there was no contract in effect. Both parties made no distinctions between complete and partial strike activities. So far as their own agreement was concerned, upon the expiration of the contract, the Company was as alert to the possibility of a partial as to a complete strike, and the Union regarded all tactics incorporated into the no-strike provision as equally available.

7. Impact of Union Activities on This Bargaining

While the Board concluded that these Union activities impaired the process of collective bargaining, frustrated the duty of reasonable discussion, and generally wreaked great damage upon this bargaining, the Board, as we have seen, at the same time expressly disavowed the relevancy of actual impact *vel non* on the bargaining. Although Respondent introduced the transcript of the negotiations and proved it had bargained in good faith, the Board did not even consider that defense. The Board merely presumed that the impact was fatal while ruling that proving *any* impact was unnecessary. In other words, whatever the facts as to good faith bargaining, the Board will be governed rigidly by its own theory that there must have been bargaining in bad faith.

C. A Board Decision Based on a Per Se Approach and Such Disregard of the Record Cannot be Sustained

It is well established that the Board cannot be sustained when it finds bad faith bargaining on a *per se*

rationale or when it fails to consider all the facts in a particular case. The decisions of this Court, while arising in the context of charges against employers, have made very clear what the Act requires of the Board in a case involving a charge of bad faith bargaining.

In *Labor Board v. American Ins. Co.*, 343 U.S. 395, 409, for example, this Court spoke as follows:

“Accordingly, we reject the Board’s holding that bargaining for the management functions clause proposed by respondent was, *per se*, an unfair labor practice. Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer’s duty to bargain collectively * * * do not justify condemning all bargaining for management functions clauses covering any ‘condition of employment’ as *per se* violations of the Act. The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8 (d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.”

* These words are directly applicable to this case. The Board’s holding here that any use of any Union activity it regards as “harassing” be, *per se*, an unfair labor practice must likewise be rejected. The Board’s fears that use of such tactics may lead to a violation of the Act cannot justify condemning all use of such tactics as *per se* violations.

Whatever the specific issue involved, this Court has emphasized that “a statutory standard such as ‘good faith’ can have meaning only in its application to the particular facts of a particular case.” *Labor Board v.*

American Ins. Co., supra, at 410. On the issue of whether an employer must make economic data available in bargaining, for example, the Court cautioned the Board that a finding of unfair practice was being sustained only "under the facts and circumstances of this case," for "each case must turn upon its particular facts." *Labor Board v. Truitt Mfg. Co.*, 351 U.S. 149, 153. The dissenting Justices were in no disagreement with this principle, for they held the Board had in fact not reviewed the entire record, including such factors as the "previous relationship of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations," but had instead made "a rule of law out of one item—even if a weighty item—of the evidence. There is no warrant for this." *Id.* at 155. As this is precisely what the Board did here, its order could not stand.

"Congress has * * * made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial when viewed in the light that the record *in its entirety* furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 488 (emphasis added). In this case, the Board refused to consider the entire record and there is no judicial alternative to setting the Board Order aside.

In this case, the Board's refusal to review or consider the entire record is a reflection, we submit, of its desire to exercise powers denied it by the Congress. Even if those powers are expertly and wisely exercised, they are exercised illegally.

It is true that "Agencies, whether created by statute or Executive Order must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority." *Peters v. Hobby*, 349 U.S. 331, 345. "Neither we nor the Commissioner may rewrite the statute simply because we feel that the scheme it creates could be improved upon. * * * We cannot but regard this 'Treasury' regulation as no more than an attempted addition to the statute of something which is not there." *United States v. Calamiano*, 354 U.S. 351, 357, 359. "Administrative determinations must have a basis in law and must be within the granted authority. * * * An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board v. Nierotko*, 327 U.S. 358, 369.

The specific statutory prohibitions against Board action must be enforced. "While there is an area plainly covered by the language of the Act" there is "an area no less plainly without it." *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194. The right to strike which Congress safeguarded from Board regulation, like any other "definite prohibition which Congress inserted in the Act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." *Leedom v. Kyne*, 358 U.S. 184, 189, and cases cited therein.

As this Court stated in *Colgate Co. v. Labor Board*, 338 U.S. 355, 363, "It is not necessary for us to justify the policy of Congress. It is enough that we

find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. * * * To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." The Board's action had to be set aside in this case because it was "contrary to the intent of Congress, was arbitrary, and was beyond its power." *Office Employees v. Labor Board*, 353 U.S. 313, 320.

CONCLUSION

For the reasons set forth herein, Respondent prays the Court to affirm the judgment below.

Respectfully submitted,

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Washington 6, D. C.

Attorney for Respondent

October 31, 1959

MEMORANDUM TO

JOHN

FATHER'S PRESENT

FILE COPY

No. 15

Supreme Court, U.S.

FILED

OCT 1 1959

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MOTION TO JOIN PARTY RESPONDENT

J. LEE RANKIN,

Solicitor General,

Department of Justice, Washington 25, D.C.

STUART ROTHMAN,

General Counsel,

National Labor Relations Board, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 15

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO JOIN PARTY RESPONDENT

The Solicitor General, on behalf of the National Labor Relations Board, moves that the Court enter an order joining, as a party respondent to this cause, Insurance Workers International Union, AFL-CIO. In support thereof, it is shown as follows:

1. On December 13, 1957, the Board issued an order against Insurance Agents' International Union, AFL-CIO, its officers, representatives, agents, successors and assigns to cease and desist from engaging in certain unfair labor practices "provided the Respondent remains the representative of the employees [of the Prudential Insurance Company] in the appropriate unit as prescribed in Section 9 of the Act." (R. 34-37.)

(1)

2. On January 26, 1959, the Court granted the Board's petition for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit to review the judgment of that court setting aside the Board's order. (358 U.S. 944.)

3. In two other proceedings pending before the Board (which are fully set forth in respondent's memorandum respecting abatement or mootness filed herein and the Board's response thereto), respondent has represented to the Board that on or about May 27, 1959, it merged with Insurance Workers of America, AFL-CIO, under the name Insurance Workers International Union, AFL-CIO, and that by virtue of such merger "the two Unions * * * transferred all their rights and interests, including those in pending Board cases and collective bargaining contracts and certifications, to the Insurance Workers International Union, AFL-CIO." On the basis of these representations, respondent moved the Board to substitute the name of Insurance Workers International Union, AFL-CIO for respondent's name in those proceedings. As more fully set forth in the Board's memorandum filed in response to respondent's suggestion of mootness, the Board granted the motion.

4. It is respondent's position that the Insurance Workers International Union, AFL-CIO is "its legal equivalent or successor for all purposes, including rights and obligations under the Labor-Management Relations Act" (Respondent's memorandum respecting abatement or mootness, p. 3).

5. The Prudential Insurance Company, which is the employer involved in the instant case, has recognized

the Insurance Workers International Union, AFL-CIO as the bargaining representative of the employees in question and entered into a collective bargaining agreement with it.

6. In view of the foregoing circumstances, it is appropriate that Insurance Workers International Union, AFL-CIO be joined with Insurance Agents' International Union, AFL-CIO in the above-entitled proceeding. Cf. Rule 25(c), Federal Rules of Civil Procedure; *National Labor Relations Board v. Lion Oil Co. and Monsanto Chemical Co.*, 352 U.S. 282.

Accordingly, it is requested that the Court enter an order joining Insurance Workers International Union, AFL-CIO as a party respondent in this case.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,
National Labor Relations Board.

OCTOBER 1959.

RESISTANT'S OBJECTION

TO ACTION OF

AMICUS CURIAE

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. 15

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO,
Respondent

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**RESPONDENT'S OBJECTION TO MOTION OF
AMICUS CURIAE**

Respondent objects to granting the Motion of *Amicus Curiae* and has withheld consent to the filing of Memorandum For The Prudential Insurance Company of America, *Amicus Curiae*, Respecting Respondent's Suggestion of Abatement or Mootness And In Support of Petitioner's Motion To Add Insurance Workers International Union, AFL-CIO, As A Party Respondent (hereinafter referred to as "A.C. Mem."), for the reason that the said Memorandum sets forth no facts or questions of law that have not been presented by the parties, nor any facts or questions of law which are material to the disposition of this case, as

required by Rule 42 of this Court. Indeed, the Motion does not address itself to the requirements of the Rule. It does nothing more than restate the position of *Amicus* on the merits. No reason is suggested for granting the Motion, other than the consent of the parties to file *other* documents. Consent to file a Brief on the merits is hardly a license to Prudential to file any other document it desires, however repetitious and immaterial, or to participate in this case as though it were a full-fledged party.

The Memorandum purports to add, in its Appendix, a document not submitted by the parties, namely, the Merger Agreement between Respondent and the Insurance Workers of America, AFL-CIO. While some of the purported names of the signatories are not authentic, Respondent is much more concerned about the document's immateriality to the issues before the Court regarding the status of Respondent. These issues were created by the conduct of Petitioner and *Amicus* subsequent to the effectuation of the merger, which was of course *subsequent* to the Merger Agreement. These issues have arisen not because the parties to the Merger Agreement have any doubts as to their rights and obligations in relation to one another, but solely because of the position taken towards the legal effect of the merger by the Board and Prudential.

The fact is that Prudential obtained a copy of the Merger Agreement, for a limited purpose, *prior* to the time it *objected* to the granting of the Motion To Change Name of Union in Board Case No. 22-CA-194. See Resp. Mem., App. A, 5. While it is true that Prudential has withdrawn its objection, this change of heart seems clearly to have been caused by the filing of Respondent's Memorandum Respecting Abatement or Mootness in this Court, and not to Prudential's having

gained new insight into the text or the meaning of the merger documents. In any event, the Board Order, Resp. Mem., App. B., 7, is based expressly on the consent of the parties and certainly not on any review of documentary evidence. Prudential, having already adopted one position in opposition to that which it now says is clear, seems free to interpret the merger in a different way in other cases, or perhaps even in the subsequent stages of Case No. 22-CA-194 itself.

The Merger Agreement is obviously immaterial to the termination of Respondent's status as collective bargaining representative of these employees, and to the independent assumption of said representation by the new International, the Insurance Workers International Union, AFL-CIO (hereinafter referred to as "IWIU"). IWIU was recognized in a new contract, to which Respondent is not a party, effective September 21, 1959.

The Merger Agreement fulfilled its function in this situation while the contract between Prudential and Respondent was in effect. The Agreement lost its function and relevancy to the question of bargaining representation when that contract expired on July 6, 1959.

IWIU is now the bargaining representative in its own right. It has that status by virtue of Prudential's recognition of it and the consequent contract between Prudential as the Employer and only IWIU on the Union side. The Merger Agreement can contribute nothing to a determination of whether this case, involving as it does a Board Order in terms subsisting only while "the Respondent remains the representative of the employees," R. 35, has been rendered moot because Respondent is no longer such representative.

If any documentary evidence bearing on the merger is to be reviewed, all of it should be. If the Court should conclude that such review is necessary at this time to determine the legal status of the present and the proposed Respondent, the Court might consider whether it prefers to make such review and determination itself, or whether the case should be remanded for such purpose.

Respondent does not believe it fully accurate to say that there was any submission of proof in Board Case No. 22-CA-194, as *Amicus* represents at A.C. Mem., 2. Counsel for the parties discussed a proposed Stipulation and tentative agreement was reached thereon; but the consent of Prudential called the halt in that procedure. Prudential did not obtain a copy of the Merger Agreement in the course of these discussions between counsel. As already noted, that copy had been obtained earlier, for a different and restricted purpose, before Prudential filed its objection to regarding IWIU as the same Union as Respondent.

For these reasons, neither the Appendix nor the text of the Memorandum of *Amicus* adds anything material to the issues put before the Court by the Memoranda and Motions of the parties themselves. Respondent submits that the Motion of *Amicus* should be denied.

Respectfully submitted,

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FILED

OCT 14 1959

JAMES R. BROWNING, Clerk

No. 15

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

**INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO,
Respondent**

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**OPPOSITION OF INSURANCE WORKERS
INTERNATIONAL UNION, AFL-CIO, TO MOTION
TO JOIN PARTY RESPONDENT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. 15

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO,
Respondent

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**OPPOSITION OF INSURANCE WORKERS
INTERNATIONAL UNION, AFL-CIO, TO MOTION
TO JOIN PARTY RESPONDENT**

The Insurance Workers International Union, AFL-CIO, hereinafter referred to as "IWIU", having been served with Petitioner's Motion To Join Party Respondent, which seeks to add IWIU as an additional party Respondent in this case, hereby opposes said Motion on the grounds that it had no connection with the factual circumstances involved in the case and that there is no reason for its joinder.

IWIU did not even come into existence until long after this legal battle had been joined. The events here in dispute terminated in June, 1956; after a hear-

ing before a Trial Examiner, the Intermediate Report was issued in December, 1956; the Board Decision and Order came down in December, 1957; the Judgment of the Court below was entered in October, 1958; and this Court granted the Government's Petition for a Writ of Certiorari in January, 1959. IWIU was not created until May, 1959. Obviously, it was not involved, and could not possibly have been involved, at any stage of this case.

Petitioner Board has not accepted IWIU as standing in the legal shoes of Respondent. As is set forth more fully in the Memoranda filed by the parties in this case, two Board cases are pertinent. In one representation case, even though Respondent's statements as to the merger which created IWIU were not questioned by the Employer, the Board required IWIU to submit authorization cards, as though IWIU were a completely different Union and as though no showing of interest had been made by Respondent. In the other case, where Prudential did at first challenge the representations as to the merger but later consented to an order changing the name of the Union, the Board clearly indicated that it regarded IWIU's legal relationship to Respondent as an open question, whenever the parties did not stipulate, to be determined by the particular record to be made in a particular case. In the face of these Board actions in cases where IWIU was concerned about its own rights with regard to the future conduct of Employers, IWIU cannot consent to its being joined in this case where the issue involves only past events with which IWIU had nothing to do.

IWIU does not question that it may feel bound, depending upon the circumstances then obtaining, to carry out the Board Order, if any, which may ultimately be judicially enforced as to Respondent's 1956 conduct.

If it will so feel bound, it will be because of agreements in which Petitioner played no part and to which Petitioner (as well as *Amicus*) is neither a party nor a third party beneficiary. There is no need for IWIU to speculate on what its legal rights and obligations may be under uncertain eventualities. These will be determined by the circumstances of fact and of law which will be presented if and when a Court Order is entered against Respondent, and the Board, considering the Order disobeyed, institutes contempt proceedings. "No one can be punished for contempt because of these words [successors and assigns' in Labor Board Orders] until after a judicial hearing, in which their operation could be determined on a concrete set of facts." *Regal Knitwear Co. v. Labor Board*, 324 U.S. 9, 16.

IWIU feels that it should be free to determine its course as of that time. There is no justification for joining it as a party now.

If it should nevertheless be joined, however, the Insurance Workers International Union, AFL-CIO, hereby moves the Court for leave to file a Brief. If it is to be a party, it is entitled to exercise the right of a party to make whatever contribution it should deem fit in its own interests to the argument of the case.

Respectfully submitted,

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*Attorney for Insurance
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ABSTRACT OF DISSENT

A COMPOSITION BY

THE HONORABLE ALBERT

JOHN STAFFY PRESIDENT

FILE COPY

U.S. Supreme Court, U.S.

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Respondent

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

MEMORANDUM OF RESPONDENT IN OPPOSITION
TO PETITIONER'S MOTION TO JOIN
PARTY RESPONDENT

* * * * *
CONTINGENT MOTION TO DELETE PARTY
RESPONDENT

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IN THE
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NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO,
Respondent

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**MEMORANDUM OF RESPONDENT IN OPPOSITION
TO PETITIONER'S MOTION TO JOIN
PARTY RESPONDENT**

When Respondent filed its Memorandum Respecting Abatement or Mootness (hereinafter referred to as ("Resp. Mem.") on September 11, 1959, it did so because it believed that certain circumstances had occurred since the granting of the Petition for a Writ of Certiorari which should be called to the attention of this Court. In particular, the circumstances were the refusal of the Petitioner Board and the Prudential to recognize fully the merger in May, 1959, between Respondent and another International Union, creating

a new International, the Insurance Workers International Union (hereinafter referred to as "IWIU"). The Board had required IWIU to produce new authorization cards in a representation case, as though IWIU were a completely new and different Union from Respondent, and as though Respondent had already not submitted an adequate showing of interest in the case. Also, the Board had ruled that further evidence must be taken on "the alleged merger", when Prudential objected to substituting IWIU for the Respondent in an unfair labor practice case pending before the Board.

Subsequent to and evidently because of the filing of Respondent's Memorandum, Prudential has changed its position in the case before the Board and withdrawn its objection, and the Board has granted Respondent's Motion in that case and has filed in the instant case a Motion to Join Party Respondent, the IWIU. Beyond certainly establishing that both Prudential and the Board feel free to change their positions on the legal significance of the merger depending upon their current desires in particular cases, and beyond possibly removing the significance of the unfair labor practice case as an example of their variability and inconsistency, Petitioner and the Prudential have not altered the fundamental dimensions of the problem before the Court as to Respondent's status. That problem would not be changed by granting the Motion To Join Party Respondent.

For one thing, the Board Order in the representation case remains unaltered and unalterable. At this time, the Board suggests to this Court that its ruling that designation cards naming Respondent did not survive the merger and were not transferable to IWIU was

"a precautionary measure." Memorandum For The National Labor Relations Board In Response To Respondent's Suggestion of ~~Mootness~~ (hereinafter referred to as "Pet. Mem."), 3. There is no such expression or rationalization in the actual Board Order in the case. Resp. Mem., App. B, 3a. Assuming, however, that precaution was the basis of the Board decision, the only possible situation against which the Board was guarding was that IWIU be accepted as the legal equivalent or successor of Respondent. Had the Board in fact regarded IWIU as only a change in name, rather than a change in the legal status of Respondent under this Act, the Board could not reasonably have required IWIU to undertake the significant expenditure of funds and resources required in obtaining new authorization cards. If Respondent has lost status for the purpose of Board representation cases, it would appear to have lost status as an organization against which a Board Order could operate. Inasmuch as the Board has not permitted Respondent to transfer its rights in representation designations to IWIU, the Board should not be permitted to transfer any obligations which Respondent may have under the Act to IWIU.

Furthermore, in the most recent development, Prudential and IWIU have reached agreement on a new collective bargaining contract, effective September 21, 1959, for the employees involved in this case. The contract is between two parties only, Prudential and IWIU. There is no mention of Respondent. There is nothing in the contract which suggests that IWIU is the contracting party because it is "the successor union", Pet. Mem., 2-3, or for any other reason. This collective bargaining contract incorporates no more

genealogy than the typical contract which is absolutely unconcerned with family tree considerations.

There is no mention of this contract in the Board Order in Case No. 22-CA-194, contrary to the implication at Pet. Mem., 2-3. As the Order itself makes clear, Prudential had changed its position on September 18, prior to the September 21 effective date of the new contract. Pet. Mem., App. B, 7-8. Likewise, there is no mention in the Board Order—and no discernible basis for the Board to speculate on these subjects in its Memorandum, Pet. Mem., 4—of the interest or control which Respondent will exercise in future collective bargaining with Prudential. Indeed, it seems impossible to estimate or ascertain any such interest or control, where a new, merged Union is the collective bargaining representative.

IWIU has been recognized as bargaining representative on and for its own merits and standing. There is nothing in the contract to suggest that the recognition rested, in whole or in part, upon any relationship with Respondent. The plain fact is that Respondent no longer is the representative of these employees. Moreover, under present circumstances, the only reasonable prediction is that Respondent will never again be their representative.

The Board order is applicable only so long as "the Respondent remains the representative of the employees in the appropriate unit as prescribed in Section 9 of the Act." Resp. Mem., 2; R. 35. If it is not so remaining, neither Respondent nor any of its officers, representatives, agents, successors and assigns" is subject to the Order.—*Ibid.*; R. 34. As Respondent is no

longer the bargaining representative, it would appear that the case has been mooted.

This Court, however, upon its consideration of the foregoing circumstances, may conclude that Respondent retains sufficient legal life to answer for its own past conduct. Alternatively, the Court may conclude that Respondent lacks such legal status. Or the Court may conclude that all questions regarding Respondent's status need not be answered now by this Court, but should rather be resolved if and when they should arise in the subsequent stages of this case, if any. In any event, joining another party will not affect the status of this Respondent.

In one sense, the issue of whether there is a party in existence to carry out the Board order does not arise unless and until three eventualities should occur, namely, judicial enforcement of the Board Order, disobedience of that Order, and the bringing of contempt proceedings by the Board. Only if all three occurred would the question be raised of what Union, under the circumstances then obtaining, is to be held subject to the Board Order.

Adding a party does not affect and thus cannot answer any of the questions which this Court may ask about the status of Respondent. Accordingly, Respondent submits that the Motion To Join Party Respondent is irrelevant to the issue of mootness, lacks merit and should be denied.

* * * * *

CONTINGENT MOTION TO DELETE PARTY RESPONDENT

In the event that Petitioner's Motion is nevertheless granted, the present Respondent, Insurance Agents' International Union, AFL-CIO, hereby moves the Court to delete it as a party Respondent. There could be no justification for adding IWIU as a new party Respondent unless the Court should believe that IWIU should somehow now be held responsible for Respondent's 1956 conduct. IWIU can be subjected to no more legal burden than Respondent is held to have relinquished by whatever loss of legal life this Court should decide Respondent has suffered. There can be no joint liability.

The Board cannot have it both ways. If Respondent is answerable for its past conduct, as the Board seems to be arguing in its Memorandum, there is no need to join another party. On the other hand, if Respondent is not answerable, it should not be in the case. Particularly if some other party is thus answerable, Respondent should not be retained as a party.

For the reasons set forth herein, Respondent believes that Petitioner's Motion to Join Party Respondent should not be granted; and that if it is, Respondent should be deleted as a party Respondent.

Respectfully submitted,

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BRIEF
OF

ARTICULS CURIAE

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AUG 18 1959

JAMES R. BRUNNING, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

No. 15

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INSURANCE AGENTS INTERNATIONAL UNION,
AFL-CIO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA

MOORE BRIEF OF AMICUS CURIAE

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MOTION OF AMICUS CURIAE

The undersigned as Counsel for THE PRUDENTIAL INSURANCE COMPANY OF AMERICA (hereinafter "Company"), respectfully move this Court for leave to file the accompanying brief as *amicus curiae*.

Both the Petitioner and the Respondent have consented to the filing of a brief by the Company as *amicus curiae*.

The consent granted by both parties is particularly appropriate in this case because the Company is just as much a real party in interest, and is as directly affected by the decision of this Court, as the Respondent union. By a curious paradox created by statute, the Company must move this Court for leave to appear, although the Company could have been the Petitioner before this Court as a matter of right, if the National Labor Relations

Board had not sustained the Unfair Labor Practice charges filed by the Company.¹

On the basis of charges filed by the Company and additional proofs submitted by the Company, the Board issued a complaint against the Union, charging that the Union failed and refused to bargain in good faith with the Company as required by Section 8(b)(III) of the National Labor Relations Act. The Trial Examiner recommended the dismissal of the complaint in its entirety. The Board reversed the Trial Examiner and sustained the complaint in its entirety and issued a Cease and Desist Order against the Union.

From the very outset of the foregoing proceedings until the present date, the Company has appeared and filed briefs in all proceedings. The Company's Counsel fully participated in the presentation of oral argument whenever the occasion arose in the proceeding before the Trial Examiner, before the Board, and before the Court of Appeals. The Company also appeared as *amicus curiae* in support of the petition for certiorari. Almost all of the voluminous testimony presented in these proceedings was developed and prepared by the Company. The Unfair Labor Practice charge was based upon nationwide activities directed by the Union to induce its members to engage in "slow-downs", "sit-ins", "late-reporting" and other harassing tactics. This took place in the various District offices of the Company, which does business in forty-six States of the United States through over one thousand District and Detached offices, offices employing

1. Sec. 10(f) of the National Labor Relations Act provides that "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the Circuit wherein the Unfair Labor Practice in question was alleged to have been engaged in, or in the United States Court of Appeals for the District of Columbia * * *" As the Company won its case before the Board, it was not a "person aggrieved."

over twenty thousand agents. Thus, these proceedings affect practically every community in the United States.

The Company is a mutual insurance company with a statutory obligation to protect the interests of its more than thirty-four million policyholders. The facts relating to these activities and the effects upon such communities are known principally to the Company, which assumed the burden of collecting, preparing and presenting numerous documents and exhibits which largely constitute the record of these proceedings.

Another compelling reason for filing an *amicus* brief is that the Company desires to urge grounds for reversing the Court below which the Petitioner has failed to urge in its brief. In the Court of Appeals and here, the Petitioner relies solely upon the contention that the Court of Appeals erred in the rule of law enunciated in *Textile Workers Union v. N.L.R.B.*, 227 F. 2d 409 (C.A.D.C.) certiorari granted, 350 U. S. 1004, order granting certiorari vacated, 352 U. S. 864 (R. 38 Note 11, 39), and applied the same erroneous ruling to the case at bar. The Company agrees with this position but further urges that even if the rule of the *Textile Workers* case is correct, finding unfair certain Labor Practices established in this case would not conflict with the rule of the *Textile Workers* case. This important ground for granting certiorari will not be presented at all unless it is presented by the Company as *amicus*.

Respectfully submitted,

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August 14, 1959.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

No. 15

NATIONAL LABOR RELATIONS BOARD,
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v.

INSURANCE AGENTS INTERNATIONAL UNION, AFL-CIO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA

**BRIEF OF PRUDENTIAL INSURANCE COMPANY
OF AMERICA AS *AMICUS CURIAE***

This brief is respectfully submitted by the PRUDENTIAL INSURANCE COMPANY OF AMERICA, (hereinafter referred to to as "Company") an *amicus curiae*.

The Company agrees with the statements in the Petitioner's brief under the following headings, and will not impose upon this Court with a repetition thereof.

Opinions Below
Jurisdiction
Statute Involved
Questions Presented
Statement

Summary of Argument

The Company, rather than the Board, is particularly qualified to demonstrate the adverse effect upon industry, employer-employee relations, and the public welfare inherent in the type of collective bargaining which gave rise to the conflict herein. Accordingly, this brief will be primarily confined to a practical discussion of the impact of the Union's harassing tactics during contract negotiations and the consequences of a continued holding that such tactics do not constitute bargaining in bad faith. Naturally, this must be related to what the Company believes to be the proper interpretation of the law involved.

The Company proposes to demonstrate the following:

A. The *Textile Workers'* case is based entirely upon two basic errors—one of law and one of logic.

B. The Union's tactics are designed to inflict and do inflict great and irreparable injuries to the employer and other parties.

C. A finding that such tactics are not a violation of Sec. 8 of The National Labor Relations Act as amended (161 Stat. 136, 29 U. S. C. Secs. 151 *et seq.*) hereinafter referred to as the "Act", creates an overwhelming im-

balance of bargaining power, contrary to a basic purpose of the Act.

D. In the absence of protection under Sec. 8 against such "harassing" tactics, no adequate remedy exists for the employer.

E. Affirmance of the majority decision in the *Textile Workers* case will inevitably lead to serious industrial strife, the prevention of which was the major purpose of the Act.

F. This case is clearly distinguishable from the *Textile Workers* case, and there is far more justification for sustaining the Board's order here than there was in the *Textile Workers* case.

ARGUMENT

A. The Textile Workers Case is Based Entirely Upon Two Basic Errors—One of Law and One of Logic.

The majority of two judges in the Court of Appeals rested their decision upon the two grounds paraphrased below. The opinion of the Court of Appeals does not reveal whether both or either of the grounds stated were essential to the decision. As neither ground is now valid, the decision must fall.

1. The Court of Appeals stated that the Supreme Court of the United States, in *International Union, UAW v. Wisconsin Employment Relations Board*, 336 U. S. 245 at page 253, held that Congress did not delegate to the National Labor Relations Board the power to permit or forbid Union conduct of the nature involved herein. The opinion concluded by adopting the following language from the aforesaid Supreme Court decision:

"* * * [T]he conduct here described is not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner." (336 U. S. at Page 253)

Judge Danaher, in his dissenting opinion in the Court of Appeals, disagreed with the majority's interpretation of Supreme Court's decision in *International Union, UAW v. Wisconsin Employment Relations Board*, *supra*, by pointing out that the Supreme Court:

"* * * did not have before it the question of whether the conduct in that case might constitute evidence of lack of good faith in bargaining." (227 F. 2d at p. 412)

Since the Court of Appeals' decision in the *Textile Workers* case, the Supreme Court of the United States has spoken again on this subject. It is now clear that the majority opinion below misinterpreted this Court's opinion. In a later case by the same name, *International Union, UAW v. Wisconsin Employment Relations Board*; 351 U. S. 266, this Court held that *both* the Board and the State had power to enjoin the same conduct. This Court stated, at page 274:

"Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence. This conclusion has been explicit in the opinions cited in note 12." Note 12 cites the earlier case of *International Union, UAW v. Wisconsin Employment Relations Board*, 336 U. S. 245, 253.

2. The only other ground for the majority decision below is succinctly set forth in this language of the opinion:

"As the Board intimated, the Union might have called a strike; no inference of failure to bargain

could have been drawn from a total withholding of services, during negotiations, in order to put economic pressure on the employer to yield to the Union's demands. As a simple matter of fact, it is equally clear that no such inference can be drawn from a partial withholding of services at that time and for that purpose." (227 F. 2d at p. 410)

The Court's argument may be reduced to this syllogism:

- (i) Under the statute a strike is not an Unfair Labor Practice.
- (ii) A total withholding of services is a strike.
- (iii) A partial withholding of services is a partial strike.

Conclusion: A partial strike is not an unfair Labor practice.

The first two premises are true. As the third premise is plainly false, the conclusion is unfounded. A partial withholding of services is not any kind of strike, partial or otherwise. The essence of a strike is a total withholding of services by the employees by simply terminating the employer-employee relationship which relieves the employer of any obligation to accept and pay for such services. Sit-downs, slow-downs, and interferences with the Company's business operations while still on the job and collecting compensation is no kind of strike at all.

By a similar indulgence in semantics, the majority below could hold that the Company would not be guilty of an unfair labor practice if it "partially discharged" its workers by reducing the paid hours of employment or by changing the working conditions to accept only part-time employment. However, the law is clear that the same logic used by the majority below would not be applicable

to an employer. (*NLRB v. Crompton-Highland Mills*, 337 U. S. 217).

In *NLRB v. Fansteel Metallurgical Corp.* 306 U. S. 240, this Court, in effect, rejected the basic logic of the *Textile Workers* case by refusing to extend the protection granted to the right to strike to other harassing activities, such as sit-downs, which the Court held did not constitute "strikes". Thus, this Court has already held that the concerted activities whose protection is contemplated by the Act, does not include the activities involved in the case at-bar. The Union cannot come under the protective umbrella of a strike by mislabeling activities totally different from a strike as a "partial strike."

It is respectfully submitted that as the two props upon which the majority below relied must fall, the rule of the *Textile Workers* case must also fall.¹

B. Harassing Tactics are Designed to Inflict and do Inflict Great and Irreparable Injuries to the Employer and Other Parties.

It is clear that the Union based its campaign of "harassing" tactics upon the majority decision in the *Textile Workers* case (R. 574-575). It is reasonable to assume that other unions have been deterred from doing likewise, by the grant of certiorari in the *Textile Workers* case which this court vacated when the issue became moot. The

1. A thorough survey of all notes published in Law Reviews throughout the country dealing with the *Textile Workers* case reveals an overwhelming disapproval of the law and logic of the majority opinion of the court below.

64 Yale Law Journal 766; 69 Harvard Law Review 1337; 16 Louisiana Law Review 573; 41 Marquette Law Review 200; 54 Michigan Law Review 867; 27 Mississippi Law Review 245; 28 Rocky Mountain Law Review 283; 42 Virginia Law Review 227; 13 Washington and Lee Law Review 229.

ultimate decision in this case will unquestionably set a pattern for future collective bargaining negotiations. The importance of this decision, therefore, would be difficult to overstate and it is hoped that the Court may be assisted in arriving at a proper decision by an analysis of the damage caused by the Union's newly authorized weapons, and the consequences which must inevitably flow from a continued sanction of the use of those weapons under the majority opinion in the *Textile Workers* case.

The so-called harassing conduct consisted in major part of the following:

1. The refusal to write new business.
2. Late reporting.
3. Sit-ins.
4. Refusal to attend business conferences.
5. Refusal to participate in Company's "May-Policyholders' Month Campaign" and substituting therefor, Union's "May-Policyholders' Month Campaign".
6. Upon resuming the writing of new business, the refusal to make proper reports thereof to the proper Company officials.
7. Demonstrations and picketing.
8. Soliciting signatures to petitions from Policyholders.

These activities have been more fully described in the Board's brief and the Board's decision. The Board properly found:

"It cannot be questioned that the foregoing activities were intended and could have no effect other than to disrupt and curtail the Company's business and thereby to compel the Company to accede to the Respondent's contract demands". (R. 36)

The Union has attempted to belittle the effect of the economic pressure on the Company, apparently on the grounds that the Company is a mutual insurance company and is not engaged in "assembly line production of physical goods".² This theory cannot hold up under an examination of the facts.

The harassing tactics of the Union were designed to hurt the Company. True, the Company is a mutual insurance company and does not operate for a profit, as the term profit is normally understood. This does not mean that the Company and those it serves cannot suffer. If anything, it means that a deliberate injury inflicted upon the Company is more vicious, because it must ultimately affect persons who are not even parties to the negotiations. Let us analyze the nature and effect of the Union's harassing activities.

1. Refusal to write new business.

The Company's District Agent is assigned to a particular route or a debit which may be thought of, for present purposes, as a specific group of policyholders. In most instances, the business sold by an Agent, particularly the kind of insurance known as debit insurance, is sold to the policyholder in his debit. It is an important part of the Agent's duties for him to canvass regularly for the sale of new insurance on his debit and elsewhere. If he fails or refuses to do so, it is extremely detrimental to the Company's business. There would be no other Company Agent assigned to that debit and by the time the Agent starts his canvas again, these opportunities may no

² 2. This is in sharp contrast to the Union's directive to the membership during bargaining negotiations which stated that the "program of 'work without Contract' is now in high gear. It is having a decided effect upon management and its success has been the subject of discussions at the bargaining table". (R. 37, Footnote 8).

longer exist, as competing companies have their agents covering the same area.

The damage caused by these tactics to the Company and its business is staggering to the imagination. The stability of an insurance company is based upon distribution of its policy risks and a balanced investment program. The sudden and simultaneous refusal of the Company's many thousands of Agents throughout the country to write new insurance creates a serious imbalance which is detrimental to the public interest. Some idea of the imbalance created here may be gained by an examination of the graphs on pages 134 and 136 of the Record, which indicate that for the seven weeks most affected by the refusal to write new business, the Company's volume of new business in just two types of insurance declined by more than one hundred million dollars (thirty-nine million of "Debit New-Business" and sixty-two million of "Ordinary New Business"). The Agent's compensation is only a part of the Company's expense. It must also meet expenses running into the millions of dollars for non-selling employees, offices throughout the country, materials, printing, maintenance expenses, etc. Whether or not a single policy is sold, these and other very substantial expenses continue, and if the level of policies sold falls off substantially, these expenses are continued without any countervailing income to justify them. In addition, an insurance company's entire investment program and risk calculations are based upon projected sales of insurance. The intermittent interruption of an insurance company's sales program seriously affects all of these vital factors upon which the life of an insurance company depends.

It cannot be seriously argued by the Union that the Company does not suffer loss because the Agent re-

fuses to write new business. In order to survive as an insurance company with a balanced distribution of risks, the Company must sell new insurance. Its very business structure and existence are geared to this. If it failed to sell new insurance for a long enough period, it would eventually be out of business. In fact, the process of not selling insurance is an obvious form of slow destruction.

2. Late reporting and sit-ins.

In part, the late reporting and sit-ins were simply work stoppages. They were timed so as to cause the maximum interference with the Company's business. They were regularly scheduled for Tuesday and Friday mornings which are normally the times when agents must report to the district offices for meetings, instructions and accounting for funds and business of the Company.

In a larger sense, the sit-ins, with the agents "doing what comes naturally", contained the inherent evils of sit-down strikes which have been declared unlawful (*N.L.R.B. v. Fansteel Metallurgical Corp., supra*). In addition to the loss of agents' time, they caused a serious disruption in the ordinary business of the Company which had to be carried on regardless of the agents' work stoppage. It denied the Company the legitimate and free use of its property and curtailed the work of other Company employees.

3. Demonstrations in front of offices, picketing, distributing Union propaganda and soliciting policyholders' signatures on petitions.

The sole purpose of the above activities was to exert pressure on the Company by bringing it into disrepute, Consumer confidence in the management of a manufacturer of automobiles or appliances may not necessarily

affect the sale of the product." Such is not the case in the insurance business. Confidence in management and close friendly liaison between the company and policyholders and prospective policyholders, through the medium of the district agent, are essential to the success of an insurance company.

4. **Refusal to attend business conferences; refusal to participate in "May Policyholders' Month" and substituting therefor the "Union's May Policyholders' Month"; the refusal, upon resuming the writing of new business, to make any proper report thereof to the proper Company officials.**

The above activities have been lumped together because, regardless of their varying impact upon the Company, they all involve the usurpation of management prerogatives by the Union. In one way or another, they all involve an attempt by the Union to substitute its ideas of management for those of the Company and to take over the actual management of a portion of the Company's business. This may be far worse than a refusal to work, particularly in a company charged with the responsibility of administering what are essentially trust funds.

We do not wish to burden the court by taking up each activity in this category separately. It is sufficient to consider one example. In a company employing over 20,000 district agents throughout the United States and currently with approximately 35,000,000 policyholders residing in nearly every community of America, standard methods of reporting are manifestly essential to the Company's continued existence. When the Union decides that its members shall ignore the Company's prescribed channels and procedures for reporting new insurance risk and

shall report as the Union sees fit, it has invited chaos. Such capricious substitution of Union procedures and policies for those of the Company is a greater danger than the actual work stoppage.

Time and space permit only this almost casual review of the great harm done to the Company and those it represents. For a better understanding, much of the foregoing would have to be multiplied by hundreds of offices and thousands of incidents.

It cannot be seriously doubted that the Company was faced with an intolerable situation. Naturally, it was aware of the *Textile Workers* case and the suggested remedy of firing the employees involved. However, like the employer in that case, the Company "sought a much less drastic remedy by filing the present charge" (*Textile Workers of America CIO*, 108 N.L.R.B. p. 747). In doing so, the Company was also motivated by both practical and legal considerations. It was by now apparent that the collective bargaining techniques permitted by the *Textile Workers* case created an imbalance of bargaining power which was destructive of collective bargaining itself, and that the suggested remedy of firing was no remedy at all.

C. A finding that the tactics complained of are not in violation of Section 8 creates an overwhelming imbalance of bargaining power contrary to a basic purpose of the Act.

At the time it filed the charges against the Union, the Company was actually in the position of spending millions to finance a Union campaign:

- a) to shut off the flow of new business premiums to the Company;
- b) to transfer the functions of management from the Company to the Union;
- c) to discredit the Company in the eyes of the public in general and policyholders in particular.

The Union was under no corollary disability or pressure as it would have been had there been an actual strike.³ On the contrary, the petitioner issued a directive to the district agents stating:

"You know that the Company is unhappy because our membership are able to draw their salaries while continuing the program" (R.39, Footnote 14.)

It is a truism to say that the major purpose of the Taft-Hartley Act was to create a balance of bargaining power between labor and management. Under the old Act there was no such thing as an unfair labor practice by a union. The new Act was designed to correct this lack of mutuality and balance the rights and remedies of the contending parties. It is respectfully urged that a reversal of the Board's policy in this case would destroy any semblance of mutuality and completely deny to the employers the very remedies which the legislature intended to give them. Thus, any changes in job classifications, wages or working conditions made by the employers during the course of collective bargaining would be branded as unfair labor practices, while it would not be an unfair labor practice for the Union to make precisely the same changes. The incongruity of such a result becomes alarm-

3. Judge Dannaher, in his dissent in the *Textile Workers* case, pointed up the fallacy of comparing a partial-strike to a strike, stating:

"* * * An employee cannot work and strike at the same time. He cannot continue in his employment and openly or secretly refuse to do his work. He cannot collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business * * *. While these employees had the undoubted right to go on strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work." (227 Fed. 2d 414)

ingly apparent in the light of this particular case. If the Company, during the course of collective bargaining, suddenly and unilaterally directed its Agents to report three times a week instead of twice or to be in the office at 7 A. M. instead of 8:30, the Company would be found guilty of an unfair labor practice in short order. Nevertheless, under the *Textile Workers* decision, the Union cannot be found guilty of an unfair labor practice for arbitrarily directing similar changes in working conditions during the course of collective bargaining. In other words, when the Company performs these acts it is bargaining in bad faith, while a union can perform precisely the same acts and bargain in good faith. It is respectfully submitted that such an apparent injustice and such complete lack of mutuality were the very evils which the Act sought to eliminate.

The majority decision in the *Textile Workers* case hinges in large part upon a sweeping statement that "there is not the slightest inconsistency between genuine desire to come to an agreement and the use of economic pressure to get the kind of agreement one wants" (227 Fed. 2d 409, 410). This is an amazing new yardstick for measuring good faith in collective bargaining. Either it is a yardstick which the court meant to apply only to labor, or else the court has ignored the decision of the Supreme Court in *NLRB v. Crompton-Highland Mills*, 337 U. S. 217, where an employer was held to refuse to bargain if he changes the conditions of employment, even though he is otherwise bargaining in good faith.

Thus, the decision creates an imbalance of bargaining power contrary to the purposes of Sec. 8 by holding that the same acts relating to changes of conditions of employment are not unfair labor practices when performed by the Union, but are unfair labor practices when performed by the Company.

D. In the absence of protection under Section 8, no adequate remedy exists for the employer.

The Court's suggested remedy of firing is, in fact, little or no remedy to the employer. Only the smallest employer with no skilled labor can hope to emerge from wholesale firings without disastrous results to all concerned—the employer as well as the employee. In a highly competitive industry employing trained technicians, an employer must be prepared to gamble its very existence to discharge a substantial number of its personnel, or to shut down for any considerable period of time. Certainly, it was unrealistic to suggest that the Company in this case could counter the harassing tactics by firing the 7,000 or 8,000 Agents involved. Furthermore, a shut-down is manifestly impossible in the case of the Company which must continue to provide services to its policyholders and to discharge its other contractual and statutory obligations.

E. Affirmance of the decision in this case will inevitably lead to serious industrial strife, the prevention of which was the major purpose of the Act.

As Judge Dannaher pointed out in his dissenting opinion in the *Textile Workers* case:

"Yet, if the majority be correct, the employers' remedy will be to discharge the employees who use unprotected tactics and retaliate by a shutdown. Surely, in the interest of elimination of industrial strife and the achievement of industrial peace, the processes of collective bargaining were imported into the law and are to be enforced" (227 Fed. 2d 413).

If this formula for collective bargaining is carried to its logical conclusion, it will have the effect of destroying collective bargaining itself:

- STEP 1. The Union calls a "partial strike" in reliance upon the *Textile Workers* case.
- STEP 2. The employer fires all the employees in reliance upon the *Textile Workers* case.
- STEP 3. All collective bargaining comes to an end because the Union no longer represents any employees of the Company. (See *United Electrical Radio & Machine Workers of America (UE) v. N.L.R.B.*, 223 Fed. 2nd 338, Cert. Den. 350 U. S. 981, Rehearing Den. 351 U. S. 915).

The suggestion of self-help as a means of countering harassing activities by a union is an open invitation to industrial strife of the very nature the Act is designed to avoid. No employer can afford to finance a threat to his existence, as was the case here, nor can he be expected to abdicate in favor of the Union. If Sec. 8 offers no peaceful solution to the problem, the employer must, of necessity, resort to discharges, shut-downs and lock-outs. Naturally, this will bring retaliatory measures from the Union. Any hope of orderly collective bargaining will be replaced by the type of industrial warfare which we had hoped was extinct in this country. It is earnestly submitted that the majority decision in the *Textile Workers* case has raised the lid of a Pandora's Box which Congress intended to fasten securely for all time.

F. This case is clearly distinguishable from the *Textile Workers Case*, and there is far more justification for sustaining the Board's order here than there was in the *Textile Workers Case*.

The Union has attacked the Board's order on the ground that it did not consider the entire record of the collective bargaining negotiations, which the Union alleges will show less justification for sustaining the Board's

order here than there was in the *Textile Workers* case. The Company welcomes a consideration of this entire record because:

1. The record will clearly show the Union's reliance upon its harassing activities to obtain its demands at the bargaining table; and

2. The record will clearly demonstrate that the harassing tactics complained of in this case were far more onerous and the results far more grievous than was the case in the *Textile Workers* case.

This case is unique in that the court does not have to infer intent or purpose from harassing acts of the Union. The Union has freely stated that such acts were for the purpose of winning their contractual demands. Moreover, the record reveals that the Union considered that its important bargaining was not taking place at the table, but at such extraordinary times and places as the Union might choose through the medium of such harassing tactics as it might deem expedient to employ.

A few days after the harassing tactics began, a Union negotiator stated:

"* * * We have merely added more negotiators. The contract has expired. Under the law of the land we are permitted to carry out certain concerted activities in order to bring the employer to a more responsive attitude to our legal demands. We just have more negotiators, and this is a labor union." (R 574-575)

Furthermore, the Union issued a directive to its members stating:

"The contract will be won in the field and not at the bargaining table." (R. 523)

Should it then be concluded that the attendance of the Union negotiators at meetings was, in fact, a sham? True, the Union did not sit back and say "take it or leave it". In effect, it sat back and said "take it or you will get it". It is admitted by all parties that a "take it or leave it" attitude constitutes bargaining in bad faith. It apparently escapes the Union that a "take it or get it" attitude is a far more grievous example of bad faith, because it adds a direct threat of affirmative coercion to an otherwise passive attitude. Certainly, the presentation of an arbitrary demand backed by the deliberate infliction of injury constitutes bad faith to a far greater extent than the presentation of the same arbitrary demand backed only by the threat of doing nothing to reach an agreement.

The tactics employed by the Union in this case were more onerous than those employed by the union in the *Textile Workers* case. As more fully discussed earlier in this brief, the union was guilty of the following innovations and additions to the tactics employed in the *Textile Workers* case:

1. The union initiated the equivalent of sit-down strikes by instructing its members to "sit in" "doing what comes naturally".
2. The union sought to discredit the Company with picketing, mass demonstrations and the solicitation of petitions from policyholders.
3. The union created an entirely new weapon in collective bargaining by taking over the function of management in vital fields directly affecting the essential activities of the Company and the public welfare. The Union usurped management prerogatives in the following respects:

a) Instructed its members at what times they could and could not solicit new business.

b) Countermanded the Company's longstanding rules and regulations with respect to reporting the writing of new insurance risks and substituted therefor its own ideas of what were proper reports and to whom such reports, if any, should be made.

c) Instructed its members to refuse to attend business conferences.

d) Instructed its members to refuse to participate in Company sales campaigns, and actually substituted therefor its own version of "May policyholders month."

e) Substituted its own reporting hours for those prescribed by management.

These affirmative usurpations of management prerogatives were not present in the *Textile Workers* case. They are far more burdensome and create a much greater danger than the passive work stoppages which were involved in the *Textile Workers* case.

The Court below refused to consider whether this case was distinguishable from the *Textile Workers* case. The Board itself argued for a reversal of the rule of the *Textile Workers* case and the Court below simply followed its practice of refusing to consider the reversal of a recent decision of another three-judge panel. On this point, the Company's position differs from the Board. The Board may desire to establish a broad principle applicable to all cases which would prevent harassing activities during the course of collective bargaining. It is submitted that this Court should find a just result on the particular

facts of this case. Therefore, even if this Court were to approve the principle that "partial strikes" are not unfair labor practices because a total strike is not an unfair labor practice, a finding of bargaining in bad faith is warranted in this case without reversing the rule of the *Textile Workers* case. The interferences with the Company's business enumerated above do not involve work stoppages or "partial strikes".

We respectfully submit that the differences between this and the *Textile Workers* case are more than mere differences in degree. In the *Textile Workers* case the temporary work stoppages and slow-downs of short duration could only result in a loss in production time which could subsequently be recovered. The activities in the *Textile Workers* case were confined to the working activities of the employees in a particular factory. In this case, the Union's harassing activities were designed to create a permanent dislocation of the basic system of balancing risks through the writing of new insurance and the permanent impairment of the Company's goodwill and reputation upon which an insurance company must depend for the public acceptance of its contracts, as well as the loss of millions of dollars and a vast amount of valuable time spent in straightening out the mess caused by the Union's intrusion into management functions.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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NAHUM A. BERNSTEIN,
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NOTICE AND BRIEF OF

APPEAL CURIAE

FILED

DEC 30 1958

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1958

No. [REDACTED] 15

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.

INSURANCE AGENTS INTERNATIONAL UNION,
AFL-CIO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MOTION AND BRIEF OF AMICUS CURIAE

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IN THE
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INSURANCE AGENTS INTERNATIONAL UNION, AFL-CIO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION OF *AMICUS CURIAE*

The undersigned as Counsel for THE PRUDENTIAL INSURANCE COMPANY OF AMERICA (hereinafter "Company"), respectfully move this Court for leave to file the accompanying brief as *amicus curiae*.

Both the Petitioner and the Respondent have consented to the filing of a brief by the Company as *amicus curiae*.

The consent granted by both parties is particularly appropriate in this case because the Company is just as much a real party in interest, and is as directly affected by the decision of this Court, as the Respondent union. By a curious paradox created by statute, the Company must move this Court for leave to appear, although the Company could have been the Petitioner before this Court as a matter of right, if the National Labor Relations

Board had not sustained the Unfair Labor Practice charges filed by the Company.¹

On the basis of charges filed by the Company and additional proofs submitted by the Company, the Board issued a complaint against the Union, charging that the Union failed and refused to bargain in good faith with the Company as required by Section 8(b)(III) of the National Labor Relations Act. The Trial Examiner recommended the dismissal of the complaint in its entirety. The Board reversed the Trial Examiner and sustained the complaint in its entirety and issued a Cease and Desist Order against the Union.

From the very outset of the foregoing proceedings until the present date, the Company has appeared and filed briefs in all proceedings. The Company's Counsel fully participated in the presentation of oral argument whenever the occasion arose in the proceeding before the Trial Examiner, before the Board, and before the Court of Appeals. Almost all of the voluminous testimony presented in these proceedings was developed and prepared by the Company. The Unfair Labor Practice charge was based upon nationwide activities directed by the Union to induce its members to engage in "slow-downs", "sit-ins", "late-reporting" and other harassing tactics. This took place in the various District offices of the Company, which does business in forty-six States of the United States through over one thousand District and Detached offices, offices employing over twenty thousand agents. Thus,

1. Sec. 10(f) of the National Labor Relations Act provides that "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the Circuit wherein the Unfair Labor Practice in question was alleged to have been engaged in, or in the United States Court of Appeals for the District of Columbia * * *". As the Company won its case before the Board, it was not a "person aggrieved."

these proceedings affect practically every community in the United States.

The Company is a mutual insurance company with a statutory obligation to protect the interests of its more than thirty-four million policyholders. The facts relating to these activities and the effects upon such communities are known principally to the Company, which assumed the burden of collecting, preparing and presenting numerous documents and exhibits which largely constitute the record of these proceedings.

Another compelling reason for filing an *amicus* brief is that the Company desires to urge grounds for granting certiorari which the Petitioner has failed to urge in its brief. In the Court of Appeals and here, the Petitioner relies solely upon the contention that the Court of Appeals erred in the rule of law enunciated in *Textile Workers Union v. N.L.R.B.*, 227 F. 2d 409 (C.A.D.C.) certiorari granted, 350 U. S. 1004, order granting certiorari vacated, 352 U. S. 864 (R. 38 Note 11, 39), and applied the same erroneous ruling to the case at bar. The Company agrees with this position but further urges that even if the rule of the *Textile Workers* case is correct, certain Unfair Labor Practices established in this case would not conflict with the rule of the *Textile Workers* case. This important ground for granting certiorari will not be presented at all unless it is presented by the Company as *amicus*.

Respectfully submitted,

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December 19, 1958.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1958

No.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.

INSURANCE AGENTS INTERNATIONAL UNION, AFL-CIO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

**BRIEF OF PRUDENTIAL INSURANCE COMPANY
OF AMERICA AS *AMICUS CURIAE***

This brief is respectfully submitted by the PRUDENTIAL INSURANCE COMPANY OF AMERICA, (hereinafter referred to to as "Company") as *amicus curiae*.

The Company agrees with the statements in the Petitioner's brief under the following headings, and will not impose upon this Court with a repetition thereof.

Jurisdiction

Question Presented

Statute Involved

Statement of Fact

Summary of Argument

The Company, rather than the Board, is particularly qualified to demonstrate the adverse effect upon industry, employer-employee relations, and the public welfare inherent in the type of collective bargaining which gave rise to the conflict herein. Accordingly, this brief will be primarily confined to a practical discussion of the impact of the Union's harassing tactics during contract negotiations and the consequences of a continued holding that such tactics do not constitute bargaining in bad faith. Naturally, this must be related to what the Company believes to be the proper interpretation of the law involved.

The Company proposes to demonstrate the following:

A. The *Textile Workers'* case is based entirely upon two basic errors—one of law and one of logic.

B. The Union's tactics are designed to inflict and do inflict great and irreparable injuries to the employer and other parties.

C. A finding that such tactics are not a violation of Sec. 8 of The National Labor Relations Act as amended (161 Stat. 136, 29 U. S. C. Secs. 151 *et seq.*) hereinafter referred to as the "Act", creates an overwhelming imbalance of bargaining power, contrary to a basic purpose of the Act.

D. In the absence of protection under Sec. 8 against such "harassing" tactics, no adequate remedy exists for the employer.

E. Affirmance of the majority decision in the *Textile Workers* case will inevitably lead to serious industrial strife, the prevention of which was the major purpose of the Act.

F. This case is clearly distinguishable from the *Textile Workers* case, and there is far more justification for sustaining the Board's order here than there was in the *Textile Workers* case.

G. The decision of this Court should be expedited to be effective in this case.

ARGUMENT

A. The Textile Workers Case is Based Entirely Upon Two Basic Errors—One of Law and One of Logic.

The majority of two judges in the Court of Appeals rested their decision upon the two grounds paraphrased below. The opinion of the Court of Appeals does not reveal whether both or either of the grounds stated were essential to the decision. As neither ground is now valid, the decision must fall.

1. The Court of Appeals stated that the Supreme Court of the United States, in *International Union, UAW v. Wisconsin Employment Relations Board*, 336 U. S. 245 at page 253, held that Congress did not delegate to the National Labor Relations Board the power to permit or forbid Union conduct of the nature involved herein. The opinion concluded by adopting the following language from the aforesaid Supreme Court decision:

"* * * [T]he conduct here described is not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner." (336 U. S. at Page 253)

Judge Danaher, in his dissenting opinion in the Court of Appeals, disagreed with the majority's interpretation of Supreme Court's decision in *International Union, UAW v. Wisconsin Employment Relations Board*, *supra*, by pointing out that the Supreme Court:

"* * * did not have before it the question of whether the conduct in that case might constitute evidence of lack of good faith in bargaining." (227 F. 2d at p. 412)

Since the Court of Appeals' decision in the *Textile Workers* case, the Supreme Court of the United States has spoken again on this subject. It is now clear that the majority opinion below misinterpreted this Court's opinion. In a later case by the same name, *International Union, UAW v. Wisconsin Employment Relations Board*, 351 U. S. 266, this Court held that *both* the Board and the State had power to enjoin the same conduct. This Court stated, at page 274:

"Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence. This conclusion has been explicit in the opinions cited in note 12." Note 12 cites the earlier case of *International Union, UAW v. Wisconsin Employment Relations Board*, 336 U. S. 245, 253.

2. The only other ground for the majority decision below is succinctly set forth in this language of the opinion:

"As the Board intimated, the Union might have called a strike; no inference of failure to bargain

could have been drawn from a total withholding of services, during negotiations, in order to put economic pressure on the employer to yield to the Union's demands. As a simple matter of fact, it is equally clear that no such inference can be drawn from a partial withholding of services at that time and for that purpose." (227 F. 2d at p. 410)

The Court's argument may be reduced to this syllogism:

- (i) A strike is a protected activity.
- (ii) A total withholding of services is a strike.
- (iii) A partial withholding of services is a partial strike.

Conclusion: A partial strike is a protected activity.

The first two premises are true. As the third premise is plainly false, the conclusion is unfounded. A partial withholding of services is not any kind of strike, partial or otherwise. The essence of a strike is a total withholding of services by the employees by simply terminating the employer-employee relationship which relieves the employer of any obligation to accept or pay for such services. Sit-downs, slow-downs, and interferences with the Company's business operations while still on the job and collecting full compensation is no kind of strike at all.

By a similar indulgence in semantics, the majority below could hold that the Company would not be guilty of an unfair labor practice if it "partially discharged" its workers by reducing the paid hours of employment or by changing the working conditions to accept only part-time employment. However, the law is clear that the same logic used by the majority below would not be applicable to an employer. (*NLRB v. Crompton-Highland Mills*, 337 U. S. 217).

In *NLRB v. Fansteel Metallurgical Corp.* 306 U. S. 240, this Court, in effect, rejected the basic logic of the *Textile*

Workers case by refusing to extend the protection granted to the right to strike to other harassing activities, such as sit-downs, which the Court held did not constitute "strikes". Thus, this Court has already held that the concerted activities whose protection is contemplated by the Act, does not include the activities involved in the case at bar. The Union cannot come under the protective umbrella of a strike by mislabeling activities totally different from a strike as a "partial strike."

It is respectfully submitted that as the two props upon which the majority below relied must fall, the rule of the *Textile Workers* case must also fall.

B. Harassing Tactics are Designed to Inflict and do Inflict Great and Irreparable Injuries to the Employer and Other Parties.

It is clear that the Union based its campaign of "harassing" tactics upon the majority decision in the *Textile Workers Case* (R. 129). It is reasonable to assume that other unions have been deterred from doing likewise, by the grant of certiorari in the *Textile Workers* case which this court vacated when the issue became moot." The ultimate decision in this case will unquestionably set a pattern for future collective bargaining negotiations. The importance of this decision, therefore, would be difficult to overstate and it is hoped that the Court may be assisted in arriving at a proper decision by an analysis of the damage caused by the Union's newly authorized weapons, and the consequences which must inevitably flow from a continued sanction of the use of those weapons under the majority opinion in the *Textile Workers Case*.

The so-called harassing conduct consisted in major part of the following:

1. The refusal to write new business.
2. Late reporting.

3. Sit-ins.
4. Refusal to attend business conferences.
5. Refusal to participate in Company's "May-
Policyholders' Month Campaign" and substitut-
ing therefor, Union's "May-Policyholders' Month
Campaign".
6. Upon resuming the writing of new business, the
refusal to make proper reports thereof to the
proper Company officials.
7. Demonstrations and picketing.
8. Soliciting signatures to petitions from Policy-
holders.

These activities have been more fully described in the Board's brief and the Board's decision. The Board properly found:

"It cannot be questioned that the foregoing activities were intended and could have no effect other than to disrupt and curtail the Company's business and thereby to compel the Company to accede to the Respondent's contract demands". (R. 36)

The Union has attempted to belittle the effect of the economic pressure on the Company, apparently on the grounds that the Company is a mutual insurance company and is not engaged in "assembly line production of physical goods".¹ This theory can not hold up under an examination of the facts.

The harassing tactics of the Union were designed to hurt the Company. True, the Company is a mutual insur-

1. This is in sharp contrast to the Union's directive to the membership during bargaining negotiations which stated that the "program of 'work without Contract' is now in high gear. It is having a decided effect upon management and its success has been the subject of discussions at the bargaining table" (R. 37, Footnote 8).

ance company and does not operate for a profit, as the term profit is normally understood. This does not mean that the Company and those it serves can not suffer. If anything, it means that a deliberate injury inflicted upon the Company is more vicious, because it must ultimately affect persons who are not even parties to the negotiations. Let us analyze the nature and effect of the Union's harassing activities.

1. Refusal to write new business.

The Company's District Agent is assigned to a particular route or a debit which may be thought of, for present purposes, as a specific group of policyholders. In most instances, the business sold by an Agent, particularly the kind of insurance known as debit insurance, is sold to the policyholder in his debit. It is an important part of the Agent's duties for him to canvass regularly for the sale of new insurance on his debit and elsewhere. If he fails or refuses to do so, it is extremely detrimental to the Company's business. There would be no other Company Agent assigned to that debit and by the time the Agent starts his canvass again, these opportunities may no longer exist, as competing companies have their agents covering the same area.

The damage caused by these tactics to the Company and its business is staggering to the imagination. The stability of an insurance company is based upon distribution of its policy risks and a balanced investment program. The sudden and simultaneous refusal of the Company's many thousands of Agents throughout the country to write new insurance creates a serious imbalance which is detrimental to the public interest. Some idea of the imbalance created here may be gained by an examination of the graphs on pages 121 and 123 of the Record,

which indicate that for the seven weeks most affected by the refusal to write new business, the Company's volume of new business in just two types of insurance declined by more than one hundred million dollars (thirty-nine million of "Debit New Business" and sixty-two million of "Ordinary New Business"). The Agent's compensation is only a part of the Company's expense. It must also meet expenses running into the millions of dollars for non-selling employees, offices throughout the country, materials, printing, maintenance expenses, etc. Whether or not a single policy is sold, these and other very substantial expenses continue, and if the level of policies sold falls off substantially, these expenses are continued without any countervailing income to justify them. In addition, an insurance company's entire investment program and risk calculations are based upon projected sales of insurance. The intermittent interruption of an insurance company's sales program seriously affects all of these vital factors upon which the life of an insurance company depends.

It can not be seriously argued by the Union that the Company does not suffer loss because the Agent refuses to write new business. In order to survive as an insurance company with a balanced distribution of risks, the Company must sell new insurance. Its very business structure and existence are geared to this. If it failed to sell new insurance for a long enough period, it would eventually be out of business. In fact, the process of not selling insurance is an obvious form of slow destruction.

2. Late reporting and sit-ins.

In part, the late reporting and sit-ins were simply work stoppages. They were timed so as to cause the maximum interference with the Company's business.

They were regularly scheduled for Tuesday and Friday mornings which are normally the times when agents must report to the district offices for meetings, instructions and accounting for funds and business of the Company.

In a larger sense, the sit-ins, with the agents "doing what comes naturally", contained the inherent evils of sit-down strikes which have been declared unlawful (*N.L.R.B. v. Faustel Metallurgical Corp., supra*). In addition to the loss of agents' time, they caused a serious disruption in the ordinary business of the Company which had to be carried on regardless of the agents' work stoppage. It denied the Company the legitimate and free use of its property and curtailed the work of other Company employees.

3. Demonstrations in front of offices, picketing, distributing Union propaganda and soliciting policyholders' signatures on petitions.

The sole purpose of the above activities was to exert pressure on the Company by bringing it into disrepute. Consumer confidence in the management of a manufacturer of automobiles or appliances may not necessarily affect the sale of the product. Such is not the case in the insurance business. Confidence in management and close friendly liaison between the company and policyholders and prospective policyholders, through the medium of the district agent, are essential to the success of an insurance company.

4. **Refusal to attend business conferences; refusal to participate in "May Policyholders' Month" and substituting therefor the "Union's May Policyholders' Month"; the refusal, upon resuming the writing of new business, to make any proper report thereof to the proper Company officials.**

The above activities have been lumped together because, regardless of their varying impact upon the Company, they all involve the usurpation of management prerogatives by the Union. In one way or another, they all involve an attempt by the Union to substitute its ideas of management for those of the Company and to take over the actual management of a portion of the Company's business. This may be far worse than a refusal to work, particularly in a company charged with the responsibility of administering what are essentially trust funds.

We do not wish to burden the court by taking up each activity in this category separately. It is sufficient to consider one example. In a company employing over 20,000 district agents throughout the United States and currently with approximately 35,000,000 policyholders residing in nearly every community of America, standard methods of reporting are manifestly essential to the Company's continued existence. When the Union decides that its members shall ignore the Company's prescribed channels and procedures for reporting new insurance risks and shall report as the Union sees fit, it has invited chaos. Such capricious substitution of Union procedures and policies for those of the Company is a greater danger than the actual work stoppage.

Time and space permit only this almost casual review of the great harm done to the Company and those it represents. For a better understanding, much of the

foregoing would have to be multiplied by hundreds of offices and thousands of incidents.

It cannot be seriously doubted that the Company was faced with an intolerable situation. Naturally, it was aware of the *Textile Workers Case* and the suggested remedy of firing the employees involved. However, like the employer in that case, the Company "sought a much less drastic remedy by filing the present charge" (*Textile Workers of America CIO*, 108 N.L.R.B. p. 747). In doing so, the Company was also motivated by both practical and legal considerations. It was by now apparent that the collective bargaining techniques permitted by the *Textile Workers Case* created an imbalance of bargaining power which was destructive of collective bargaining itself, and that the suggested remedy of firing was no remedy at all.

C. A finding that the tactics complained of are not in violation of Section 8 creates an overwhelming imbalance of bargaining power contrary to a basic purpose of the Act.

At the time it filed the charges against the Union, the Company was actually in the position of spending millions to finance a Union campaign:

- a) to shut off the flow of new business premiums to the Company;
- b) to transfer the functions of management from the Company to the Union;
- c) to discredit the Company in the eyes of the public in general and policyholders in particular.

The Union was under no corollary disability or pressure as it would have been had there been an actual strike.²

2. Judge Dannaher, in his dissent in the *Textile Workers Case*, pointed up the fallacy of comparing a partial strike to a strike, stating:

"* * * An employee cannot work and strike at the same time. He cannot continue in his employment and openly or secretly

On the contrary, the petitioner issued a directive to the district agents stating:

"You know that the Company is unhappy because our membership are able to draw their salaries while continuing the program" (R. 39, Footnote 14).

It is a truism to say that the major purpose of the Taft-Hartley Act was to create a balance of bargaining power between labor and management. Under the old Act there was no such thing as an unfair labor practice by a union. The new Act was designed to correct this lack of mutuality and balance the rights and remedies of the contending parties. It is respectfully urged that a reversal of the Board's policy in this case would destroy any semblance of mutuality and completely deny to the employers the very remedies which the legislature intended to give them. Thus, any changes in job classifications, wages or working conditions made by the employers during the course of collective bargaining would be branded as unfair labor practices, while it would not be an unfair labor practice for the Union to make precisely the same changes. The incongruity of such a result becomes alarmingly apparent in the light of this particular case. If the Company, during the course of collective bargaining, suddenly and unilaterally directed its Agents to report three times a week instead of twice or to be in the office at 7 A.M. instead of 8:30, the Company would be found guilty of an unfair labor practice in short order. Never-

refuse to do his work. He cannot collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business * * *. While these employees had the undoubted right to go on strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work." (227 Fed. 2d 414)

theless, under the *Textile Workers* decision, the Union cannot be found guilty of an unfair labor practice for arbitrarily directing similar changes in working conditions during the course of collective bargaining. In other words, when the Company performs these acts it is bargaining in bad faith, while a union can perform precisely the same acts and bargain in good faith. It is respectfully submitted that such an apparent injustice and such complete lack of mutuality were the very evils which the Act sought to eliminate.

The majority decision in the *Textile Workers Case* hinges in large part upon a sweeping statement that "there is not the slightest inconsistency between genuine desire to come to an agreement and the use of economic pressure to get the kind of agreement one wants" (227 Fed. 2d 409, 410). This is an amazing new yardstick for measuring good faith in collective bargaining. Either it is a yardstick which the court meant to apply only to labor, or else the court has ignored the decision of the Supreme Court in *NLRB v. Crompton-Highland Mills*, 337 U. S. 217, where an employer was held to refuse to bargain if he changes the conditions of employment, even though he is otherwise bargaining in good faith.

Thus, the decision creates an imbalance of bargaining power contrary to the purposes of Sec. 8 by holding that the same acts relating to changes of conditions of employment are not unfair labor practices when performed by the Union, but are unfair labor practices when performed by the Company.

D. In the absence of protection under Section 8, no adequate remedy exists for the employer.

The Court's suggested remedy of firing is, in fact, little or no remedy to the employer. Only the smallest employer with no skilled labor can hope to emerge from wholesale

firings without disastrous results to all concerned—the employer as well as the employee. In a highly competitive industry employing trained technicians, an employer must be prepared to gamble its very existence to discharge a substantial number of its personnel, or to shut down for any considerable period of time. Certainly, it was unrealistic to suggest that the Company in this case could counter the harassing tactics by firing the 7,000 or 8,000 Agents involved. Furthermore, a shut-down is manifestly impossible in the case of the Company which must continue to provide services to its policyholders and to discharge its other contractual and statutory obligations.

E. Affirmance of the decision in this case will inevitably lead to serious industrial strife, the prevention of which was the major purpose of the Act.

As Judge Dannaher pointed out in his dissenting opinion in the *Textile Workers Case*:

“Yet, if the majority be correct, the employers’ remedy will be to discharge the employees who use unprotected tactics and retaliate by a shutdown. Surely, in the interest of elimination of industrial strife and the achievement of industrial peace, the processes of collective bargaining were imported into the law and are to be enforced” (227 Fed. 2d 413).

If this formula for collective bargaining is carried to its logical conclusion, it will have the effect of destroying collective bargaining itself:

STEP 1. The Union calls a “partial strike” in reliance upon the *Textile Workers Case*.

STEP 2. The employer fires all the employees in reliance upon the *Textile Workers Case*.

STEP 3. All collective bargaining comes to an end because the Union no longer represents any.

employees of the Company. (See *United Electrical Radio & Machine Workers of America (UE) v. N.L.R.B.*, 223 Fed. 2nd 338, Cert. Den. 350 U. S. 981, Rehearing Den. 351 U. S. 915).

The suggestion of self-help as a means of countering harassing activities by a union is an open invitation to industrial strife of the very nature the Act is designed to avoid. No employer can afford to finance a threat to his existence, as was the case here, nor can he be expected to abdicate in favor of the Union. If Sec. 8 offers no peaceful solution to the problem, the employer must, of necessity, resort to discharges, shut-downs and lock-outs. Naturally, this will bring retaliatory measures from the Union. Any hope of orderly collective bargaining will be replaced by the type of industrial warfare which we had hoped was extinct in this country. It is earnestly submitted that the majority decision in the *Textile Workers Case* has raised the lid of a Pandora's Box which Congress intended to fasten securely for all time.

F. This case is clearly distinguishable from the *Textile Workers Case*, and there is far more justification for sustaining the Board's order here than there was in the *Textile Workers Case*.

The Union has attacked the Board's order on the ground that it did not consider the entire record of the collective bargaining negotiations, which the Union alleges will show less justification for sustaining the Board's order here than there was in the *Textile Workers Case*. The Company welcomes a consideration of this entire record because:

1. The record will clearly show the Union's reliance upon its harassing activities to obtain its demands at the bargaining table; and

2. The record will clearly demonstrate that the harassing tactics complained of in this case were far more onerous and the results far more grievous than was the case in the *Textile Workers Case*.

This case is unique in that the court does not have to infer intent or purpose from harassing acts of the Union. The Union has freely stated that such acts were for the purpose of winning their contractual demands. Moreover, the record reveals that the Union considered that its important bargaining was not taking place at the table, but at such extraordinary times and places as the Union might choose through the medium of such harassing tactics as it might deem expedient to employ.

A few days after the harassing tactics began, a Union negotiator stated:

"* * * We have merely added more negotiators. The contract has expired. Under the law of the land we are permitted to carry out certain concerted activities in order to bring the employer to a more responsive attitude to our legal demands. We just have more negotiators; and this is a labor union." (R. 129)

Furthermore, the Union issued a directive to its members stating:

"The contract will be won in the field and not at the bargaining table." (R. 98)

Should it then be concluded that the attendance of the Union negotiators at meetings was, in fact, a sham? True, the Union did not sit back and say "take it or leave it". In effect, it sat back and said "take it or you will get it".

The Union has cited the legislative sources which clearly establish that Congress intended that Sec. 8 (b) (3) should

prohibit "take it or leave it" bargaining by unions. Thus, it is admitted by all parties that a "take it or leave it" attitude constitutes bargaining in bad faith. It apparently escapes the Union that a "take it or get it" attitude is a far more grievous example of bad faith, because it adds a direct threat of affirmative coercion to an otherwise passive attitude. Certainly, the presentation of an arbitrary demand backed by the deliberate infliction of injury constitutes bad faith to a far greater extent than the presentation of the same arbitrary demand backed only by the threat of doing nothing to reach an agreement.

The tactics employed by the Union in this case were more onerous than those employed by the union in the *Textile Workers Case*. As more fully discussed earlier in this brief, the union was guilty of the following innovations and additions to the tactics employed in the *Textile Workers Case*:

1. The union initiated the equivalent of sit-down strikes by instructing its members to "sit in" "doing what comes naturally".

2. The union sought to discredit the Company with picketing, mass demonstrations and the solicitation of petitions from policyholders.

3. The union created an entirely new weapon in collective bargaining by taking over the function of management in vital fields directly affecting the essential activities of the Company and the public welfare. The Union usurped management prerogatives in the following respects:

- a) Instructed its members at what times they could and could not solicit new business.

- b) Countermanded the Company's longstanding rules and regulations with respect to report-

ing the writing of new insurance risks and substituted therefor its own ideas of what were proper reports and to whom such reports, if any, should be made.

c) Instructed its members to refuse to attend business conferences.

d) Instructed its members to refuse to participate in Company sales campaigns, and actually substituted therefor its own version of "May policyholders month."

e) Substituted its own reporting hours for those prescribed by management.

These affirmative usurpations of management prerogatives were not present in the *Textile Workers Case*. They are far more burdensome and create a much greater danger than the passive work stoppages which were involved in the *Textile Workers Case*.

The Court below failed to consider whether this case was distinguishable from the *Textile Workers Case*. The Board itself argued for a reversal of the rule of the *Textile Workers Case* and the Court below simply followed its practice of refusing to consider the reversal of a recent decision of another three-judge panel. On this point, the Company's position differs from the Board. The Board may desire to establish a broad principle applicable to all cases which would prevent harassing activities during the course of collective bargaining. It is submitted that this Court should find a just result on the particular facts of this case. Therefore, even if this Court were to approve the principle that "partial strikes" are protected because a total strike is protected, a finding of bargaining in bad faith is warranted in this case without

reversing the rule of the *Textile Workers Case*. The interferences with the Company's business enumerated above do not involve work stoppages or "partial strikes".

We respectfully submit that the differences between this and the *Textile Workers Case* are more than mere differences in degree. In the *Textile Workers Case* the temporary work stoppages and slow-downs of short duration could only result in a loss in production time which could subsequently be recovered. The activities in the *Textile Workers Case* were confined to the working activities of the employees in a particular factory. In this case, the Union's harassing activities were designed to create a permanent dislocation of the basic system of balancing risks through the writing of new insurance and the permanent impairment of the Company's goodwill and reputation upon which an insurance company must depend for the public acceptance of its contracts, as well as the loss of millions of dollars and a vast amount of valuable time spent in straightening out the mess caused by the Union's intrusion into management functions.

G. The decision of this Court should be expedited to be effective in this case.

We think it appropriate to point out to the Court that the collective bargaining agreement between the Union and the Company expires on July 6, 1959. Normally collective bargaining will begin many weeks prior to that time. Unless this Court renders its decision on this application in time to permit a decision before its next adjournment for the Summer, neither the Company nor the Union will know whether a legal remedy is available to restrain the activities which have been enjoined by the Board. A decision by this Court in good time might well avoid a major labor battle based upon the exercise of naked force.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

~~Respectfully~~ submitted,

SILVER, BERNSTEIN, SEAWELL & KAPLAN,
295 Madison Avenue,
New York 17, New York,
*Attorneys for The Prudential Insurance
Company of America, Amicus Curiae.*

MEMORANDUM FOR THE PRUDENTIAL
INSURANCE COMPANY OF AMERICA,
MATIUS CURTIS, RESPECTING
RESPONDENT'S SUGGESTION OF
ABETEMENT OR AIDNESS AND IN
SUPPORT OF PETITIONER'S MOTION
TO ADD INSURANCE WORKERS
INTERNATIONAL UNION, AFL-CIO
AS A PARTY RESPONDENT

77BY
No. 15-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INSURANCE AGENTS' INTERNATIONAL UNION,
AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**MEMORANDUM FOR THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, *AMICUS CURIAE*, RESPECT-
ING RESPONDENT'S SUGGESTION OF ABATEMENT
OR MOOTNESS AND IN SUPPORT OF PETITIONER'S
MOTION TO ADD INSURANCE WORKERS INTERNA-
TIONAL UNION, AFL-CIO AS A PARTY RESPONDENT**

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NAHUM A. BERNSTEIN,
Of Counsel.

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TIONAL UNION, AFL-CIO AS A PARTY RESPONDENT**

Amicus, (hereinafter referred to as "PRUDENTIAL"), respectfully submits that (a) Respondent's suggestion of mootness was prematurely presented to this Court, and (b) that it has since been established that there is no basis whatever for the suggestion of mootness. In fact, Respondent did not actually suggest mootness, but merely informed the Court that the case *may become* moot "if Respondent and Insurance Workers International Union

are different legal entities so far as the Board and its orders are concerned". (Respondent's Memorandum, P. 5.)

Petitioner has never indicated, directly or indirectly, that the Respondent and Insurance Workers International Union are different legal entities. The facts, as they exist today, are undisputed. The Respondent and the Insurance Workers of America entered into a merger agreement dated February 20, 1959, a copy of which is annexed as Appendix A. Thereafter, the merger was ratified by the conventions of both unions and all steps were taken as provided in the merger agreement to complete the merger. Thereafter, the Respondent made a motion in a pending unfair labor practice proceeding against PRUDENTIAL to change the name of the Charging Party from Insurance Agents International Union; AFL-CIO, to the name of the union into which it had merged. PRUDENTIAL requested that the Board require the Moving Party to prove the facts of merger and establish that the new entity was the successor in interest to Charging Party. The Board referred the matter to a Trial Examiner to receive such proof. Before any hearings were held, the merged union submitted its proof of the consummation of its merger and its status as the successor in interest to all the rights and obligations of the Respondent. PRUDENTIAL promptly withdrew its prior opposition to the motion to substitute the name of the merged union for the Charging Party, and consented to the entry of an order granting the motion. On September 25, 1959, the Board directed the entry of an order granting the motion.

On September 21, 1959, PRUDENTIAL and the merged union, Insurance Workers International Union, AFL-CIO, signed a collective bargaining agreement to replace the prior collective bargaining agreement with the Respond-

ent which had expired July 6, 1959.

The merger agreement, annexed as Appendix A, provides in Paragraph 7 for the assumption by the Insurance Workers International Union (merged union) of all the debts, liabilities and obligations of the Respondent. Paragraph 9 provides that the merger:

"* * * shall not affect, interrupt, or change in any way, the continuing status, or the rights or duties with respect to third persons, of any organization affiliated with the IAU or the IWA * * *"

It further provides the status of such organizations shall not be impaired:

"* * * in any pending action or proceeding * * *"

Paragraph 10 provides that the merger shall not affect the presently existing collective bargaining agreements or certifications of the IAU or the IWA, and specifically vests in the new Insurance Workers International Union all of the "* * * rights, privileges, duties and responsibilities * * *" of all such contracts and certifications.

Thus, the "possibility" of mootness suggested by the Respondent no longer exists. It is now conclusive that the Insurance Workers International Union, AFL-CIO, is the successor in interest to the rights and obligations of the Respondent and should be added as a party Respondent. The Respondent itself has repeatedly demanded the right of the new union to be made a party to all pending proceedings to which Respondent has been a party. Respondent cannot refuse now, in good faith, to honor its contractual obligations under the merger agreement which provides that the Insurance Workers International

Union, AFL-CIO shall assume all of the rights and obligations of the Respondent in all pending proceedings.

Respectfully submitted,

SILVER, BERNSTEIN, SEAWELL & KAPLAN,

By NAHUM A. BERNSTEIN

295 Madison Avenue,

New York 17, New York

Attorneys for

*The Prudential Insurance Company
of America, Amicus Curiae.*

NAHUM A. BERNSTEIN,

Of Counsel.

APPENDIX A

MERGER AGREEMENT

AGREEMENT made this 20 day of February, 1959, by and between the INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO (hereinafter referred to as the "IAIU"), and the INSURANCE WORKERS OF AMERICA, AFL-CIO (hereinafter referred to as "IWA").

WITNESSETH:

WHEREAS, the Committees representing each of the parties hereto have been negotiating an agreement for merging the IAIU and the IWA into one, single, consolidated labor organization; and

WHEREAS, the IAIU and the IWA have agreed upon the basic terms and conditions of the merger and desire to incorporate the terms of such agreement into a written document,

NOW, THEREFORE the IAIU and the IWA hereby agree as follows:

1. The IAIU and the IWA hereby solemnly agree to consolidate and merge both organizations to create a single International Union for insurance agents and insurance workers in the United States and Canada.

2. The new Union shall be known as the "INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO" (hereinafter sometimes referred to as "IWIU", or the "merged organization").

3. The parties hereto agree that the provisions of this Agreement together with the provisions of Article XXIV

of the proposed constitution, entitled "First Constitutional Convention", a copy of which is hereto annexed and made a part hereof, shall form the basis of and the procedure for the merger of both organizations.

4. The merger of the IAIU and the IWA shall be effected as follows:

(a) The Merger Committee equally represented by the IAIU and the IWA, as it has been constituted, shall be known and referred to herein as the "JOINT MERGER COMMITTEE";

(b) The Joint Merger Committee shall draft a Constitution for the IWIU as soon as possible, and such Constitution shall be submitted to the General Executive Board of the IAIU and the General Executive Board of the IWA for approval by each of them;

(c) Upon approval by the General Executive Board of each organization, this Agreement and the proposed Constitution for the IWIU, shall be submitted to separate Conventions of the IAIU and the IWA for their approval, each being convened and meeting pursuant to its own Constitution, at the same time and in the same city;

(d) Upon approval of this Agreement and the proposed Constitution for the IWIU by the separate Conventions of the IAIU and IWA, a Joint Convention shall be convened of both organizations. Such joint and merged Convention shall constitute the first regular Biennial Constitutional Convention of the IWIU, the merged Union. The Joint Convention shall transact only such business as may be necessary to effectuate the terms and conditions of this Agreement and the purposes thereof, and such other business as the Joint Merger Committee shall unanimously propose.



3a

5. The IWIU shall be deemed, for all purposes, to be a combination and continuation of the IAIU and the IWA. Neither of such organizations shall be deemed for any purpose, to be dissolved, terminated or discontinued, but upon the effective date of the merger they shall be merged and continued as a single organization, the IWIU, to be governed by the Constitution of the IWIU, which shall be an amendment to and substitute for the present separate Constitutions of the IAIU and the IWA.

6. Each Local Union in good standing at the opening of the Joint Convention and holding a charter granted by either the IAIU or IWA and in good standing, shall retain its charter and become, by virtue of the merger, a chartered Local Union of the IWIU.

7. On the effective date of the merger, all the property, real and personal and mixed, and all right, title and interest, either legal or equitable in any monies, funds or property, tangible and intangible, of the IAIU and the IWA, and their respective separate names, trademarks, and emblems, and all debts due to each of them, all the rights, privileges and powers and every other interest of each of them, of whatever nature, shall by virtue of the merger of the IAIU and the IWA, be transferred to and vested in the IWIU and all such rights and properties shall thereafter be as effectually the property of the IWIU as they were of the IAIU and the IWA. Title to any property, real, personal or mixed, legally or beneficially vested by deed or otherwise in the IAIU or the IWA, shall not be in any way impaired by reason of the merger but shall in all respects be vested in the merged organization by virtue of the merger. The IWIU shall, on and after the effective date of the merger, assume and be responsible for all the debts, liabilities and obligations of the IAIU and the IWA, and such debts, liabilities and

obligations shall from that time forth attach to the merged organization to the same extent as if the said debts, liabilities, and obligations were incurred or otherwise contracted by it.

8. The present International Officers, the present Members of the General Executive Board of the IAIU and any Trustee holding property for the IAIU, and the present International Officers, the present Members of the General Executive Board of the IWA and any Trustee holding property for the IWA, or such of the Officers or Trustees as are authorized to do so by their organizations shall be empowered to and shall from time to time after the effective date of the merger, execute and deliver or cause to be executed and delivered, upon request of the merged organization, all such deeds, authorizations, or other instruments as the merged organization may deem necessary or desirable in order to confirm the right and title and interest of the merged organization in and to the property, rights and privileges referred to in Paragraph 7 above, and shall take such further and other action as may be requested by the merged organization for such purposes.

9. The merger of the IAIU and the IWA into the IWIF shall not affect, interrupt or change in any way the continuing status, or the rights or duties with respect to third persons, of any organization affiliated with the IAIU or the IWA, or any of their subordinate or affiliated bodies; and, further shall not impair the status of such organizations, or any of their subordinate or affiliated bodies, in any pending action or proceedings, or any right, title or interest in any property or arising from any deeds, bonds, mortgages, leases or contracts of any kind, or the continuity thereof; and, further, shall not impair any federal, state or territorial certification or any rights or obligations

of such organizations, or any of their subordinate or affiliated bodies, under their existing collective bargaining agreements or checkoff authorizations.

10. The merger of the IAFU and the IWA is not intended to affect any presently existing collective bargaining agreement or any federal, state or territorial certification of the IAFU or the IWA, but all rights, privileges, duties and responsibilities vested in either the IAFU or the IWA pursuant to such contracts or certifications are intended to be vested in the IWIU by virtue of the merger.

11. The merger of the IAFU and the IWA is not intended, nor shall it be deemed, in itself to terminate the employment of any employee of either the IAFU or the IWA. All employees of the IAFU and the IWA initially shall, upon the effective date of the merger, and by virtue thereof, be deemed to be employees of the IWIU without interruption of their employment status and seniority.

12. The merger of the IAFU and the IWA shall not terminate or affect in any way any existing pension or insurance plan which may be in effect with respect to the employees of the IAFU or the IWA but such plans shall be maintained in force by the IWIU with respect to the employees covered thereby on the effective date of the merger until such time as consolidated pension and insurance plans shall be substituted therefor.

13. All members of the IAFU and the IWA shall, on the effective date of the merger, without further application or action of any kind, be deemed for all purposes to be members of the merged organization. Furthermore, wherever a condition of the enjoyment of any right or privilege is based on length of membership in the merged organization, previous membership in the IAFU or the

IWA shall be deemed the equivalent of, and the same membership in, the merged organization.

14. In case of any conflict between the provisions of the Constitution and the provisions of this Agreement, it is agreed that the provisions of this Agreement shall prevail and that the rights of all of the parties for the first two years of the merged organization's existence shall be determined by the terms and provisions of this Agreement and Article XXIV of the proposed Constitution annexed hereto.

15. Until the Second Biennial Constitutional Convention of the IWIU both the IAIU and the IWA General Counsels shall be retained, the former as Associate Counsel and the latter as General Counsel and both shall function under the direction of the International President and the General Executive Board.

16. The IWIU shall:

(a) Continue the affiliations with the Industrial Union Department and the Union Label and Service Trades Department of the AFL-CIO;

(b) Notwithstanding anything to the contrary in the Constitution of the IWIU, persons now enjoying all of the rights and privileges of membership through possession of honorary membership cards, shall continue to enjoy such status without change;

(c) As to any negotiations conducted in 1959 and 1960, continue the bargaining committee procedures, (including the method of the committee selection) satisfactory to the General Executive Board Members elected by the IWA or the IAIU, as the case may be.

17. This Agreement shall become effective upon approval of the terms hereof and of the proposed Constitu-

tion, by the separate Conventions of the IAIU and the IWA.

IN WITNESS WHEREOF, the parties have, by order of their General Executive Boards, set their hands and seals on the day and year first aforementioned.

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO

GEO. L. RUSS

By
President

MAX SHINE

By
Secretary-Treasurer

CHARLES G. HEISEL

By
Executive Board Member

OATES McCULLEN

By
Executive Board Member

CHARLES E. MORRIS

By
Executive Board Member

MANUEL L. HOFEMAN

By
Executive Board Member

JOSEPH W. BANTALL

By
Executive Board Member

LAWRENCE MELISI

By
Executive Board Member

INSURANCE WORKERS OF AMERICA, AFL-CIO

LILLIAN A. GILLEN

By
President

GILBERT H. HIGGINSON

By
Secretary-Treasurer

WILLIAM S. MACDERMOTT

By
Executive Board Member

ROBERT C. PURRI

By
Executive Board Member

LOUIS BROOKS

By
Executive Board Member

MORTIMER GELLIS

By
Executive Board Member

JOHN L. HARDING

By
Merger Committee Member

WILLIAM C. SAUNDERS

By
Merger Committee Member

MEMORANDUM FOR THE ATTORNEY GENERAL

AGENTS INTERNATIONAL UNION,

AFL CIO, RESPECTING

ABATEMENT OF ALCOHOL

FILE COPY

United States Supreme Court, D.C.

FILED

SEP 11 1959

No. 15

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

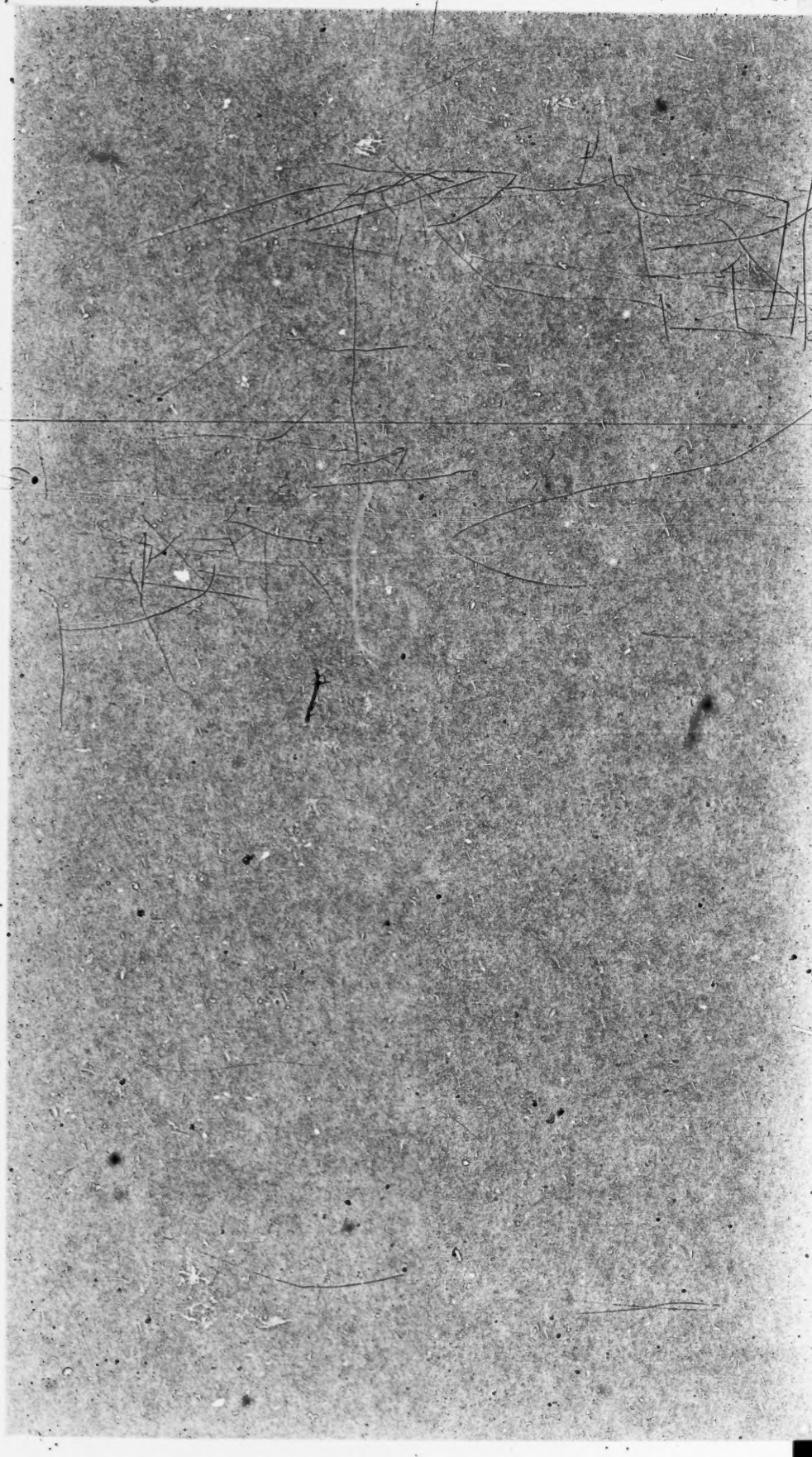
INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO,
Respondent

**On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit**

**MEMORANDUM FOR THE INSURANCE AGENTS'
INTERNATIONAL UNION, AFL-CIO, RESPECTING
ABATEMENT OR MOOTNESS**

ISAAC N. GRONER
1701 K Street, N. W.
Washington 6, D. C.
Attorney for Insurance
Agents' International
Union, AFL-CIO





IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

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INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO,
Respondent

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**MEMORANDUM FOR THE INSURANCE AGENTS'
INTERNATIONAL UNION, AFL-CIO, RESPECTING
ABATEMENT OR MOOTNESS**

The Insurance Agents' International Union, AFL-CIO (hereinafter called "Respondent"), respectfully calls to the Court's attention certain new facts which raise a possible question of abatement or mootness in this case, now awaiting argument on the merits. We think it appropriate to inform the Court of these developments and of our views as to their effect on the status of the case.

The history of the case is as follows. On December 13, 1957, Petitioner Board found that Respondent had violated Section 8(b)(3) of the Labor Management Relations Act and ordered in principal part "that the Respondent Insurance Agents' International Union, AFL-CIO, its officers, representatives, agents, successors and assigns shall:

"1. Cease and desist from refusing to bargain collectively in good faith with The Prudential Insurance Company of America, as the exclusive representative of the Company's district agents in the appropriate unit described in the Intermediate Report, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, by authorizing, directing, supporting, inducing or encouraging the Company's employees to engage in slowdowns, harassing activities or other unprotected conduct, in the course of their employment and in disregard of their duties and customary routines, for the purpose of forcing the Company to accept its bargaining demands, or from engaging in any like or related conduct in derogation of its statutory duty to bargain, provided the Respondent remains the representative of the employees in the appropriate unit as prescribed in Section 9 of the Act." (R. 34-35).

The Court below, holding that Respondent had not refused to bargain in violation of Section 8(b)(3), as found by the Board, denied enforcement of the Board Order. (R. 153). The Board's petition for certiorari was granted on January 26, 1959. (R. 155). 358 U.S. 944.

During the week of May 25, 1959, Respondent completed a process of merger with the Insurance Workers

of America, AFL-CIO, forming a new International Union, the Insurance Workers International Union, AFL-CIO (hereinafter called "IWIU"). In candor, Respondent would originally have entertained no doubt that IWIU is its legal equivalent, or successor for all purposes, including rights and obligations under the Labor Management Relations Act. But no such stipulation is now possible because Petitioner's own actions have cast formidable doubts, as yet unresolved, on the continuity of Respondent's rights and obligations under the Act. After the merger, Respondent moved Petitioner, in two different proceedings, to recognize IWIU as the same Union as Respondent or as successor to its rights in Board proceedings; but Petitioner denied Respondent's motions.

One of these cases involves the very collective bargaining contract executed after the negotiations complained of in the instant case. *The Prudential Insurance Company of America*, NLRB Case No. 22-CA-194, was before Petitioner Board, at the time of the merger, upon exceptions taken by the Prudential. *Amicus Curiae* before this Court, to a Trial Examiner's Intermediate Report finding it guilty of not bargaining in good faith with respect to grievances. When Respondent moved the Board to recognize IWIU as having the same rights as Respondent in that case, Prudential opposed the motion. On July 21, 1959, Petitioner issued an Order, attached hereto as Appendix A, remanding the case to a Trial Examiner for hearing on the issues presented by "the alleged merger". At the present time, the parties to that case are attempting to work out a stipulation of facts, in lieu of a hearing, to be presented to a Trial Examiner.

In the other case, a representation proceeding, *The Union Life Insurance Company, Inc.*, NLRB Case No. 5-RC-2678, Respondent filed a motion seeking to change the name on the ballot from itself to IWIU. On July 27, 1959, Petitioner issued an Order, attached hereto as Appendix B, granting the motion only upon condition that IWIU make a completely new showing of interest.

On July 6, 1959, the collective bargaining contract which was in terms between the Respondent and Prudential expired. While no new contract has as yet been signed, the parties have agreed that, if and when mutually satisfactory agreement is reached on other issues, the next contract will recognize IWIU. The bargaining for that contract is proceeding with IWIU and not Respondent. It thus is evident that only IWIU, and not Respondent is now recognized as the representative of the employees in this unit as prescribed in Section 9 of the Act.

In view of the foregoing, the question may arise whether Respondent's present lack of representative status, and Petitioner's present position of not recognizing IWIU as the same Union as Respondent, renders abated or moot the bargaining order which is the subject matter of litigation in the instant case. Petitioner has taken the position that the test of mootness of such an order is whether "recurrence becomes an impossibility or an extremely remote contingency." *National Labor Relations Board, Petitioner v. Textile Workers Union of America, CIO, et al.*, No. 35, October Term, 1956, Memorandum For The National Labor Relations Board Respecting Mootness, 4. Under the test there developed, this case is moot because there is no

practical possibility that Respondent will engage in the activities involved herein—if Respondent and IWIU are different legal entities so far as the Board and its orders are concerned.

Respondent submits that Petitioner cannot lawfully take one position when Respondent is seeking relief and a contrary position when relief is sought against Respondent. If Petitioner does not now know whether a charge filed by Respondent against this Employer has become abated or moot because of the merger, it cannot consistently know whether this order issued against Respondent has become abated or moot. If additional evidence and a full record is required in the one case it is equally required in the other. Further, Petitioner's refusal to recognize authorization cards signed in the name of the Respondent before the merger and its insistence that new cards be signed necessarily reflect the belief that Respondent and IWIU are different Unions for the purpose of representation rights under the Act. This means that Respondent is no longer in existence and that IWIU has not succeeded to its rights; nor, accordingly, to Respondent's obligations.

Petitioner's actions thus raise a doubt whether at this time there is any Union bound by the Board order at bar. There is doubt the Court has before it here any controversy involving real, existing parties. Because of Petitioner's actions and its present formally fixed position, it would appear that the instant case may have been rendered abated or moot. Cf. *National Labor Relations Board, Petitioner v. Textile Workers*

Union of America, CIO, et al., No. 35, October Term,
1956; 352 U.S. 864.

Respectfully submitted,

ISAAC N. GRONER

1701 K Street, N. W.

Washington 6, D. C.

*Attorney for Insurance
Agents International Union,
AFL-CIO*

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 22-CA-194

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
and

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO

**Order Reopening Record and Remanding Proceeding to
Regional Director for Further Hearing**

On April 17, 1959, Trial Examiner Thomas A. Ricci issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, and recommending that the Respondent cease and desist therefrom and take certain affirmative action, as set forth therein. Thereafter, the General Counsel and the Respondent filed exceptions to the Intermediate Report and supporting memoranda, and the Charging Party filed a brief in support of the Intermediate Report. On June 30, 1959, the Charging Party filed a Motion to Change Name of Union. The motion seeks (1) to have the Board amend the caption and formal papers in this proceeding by changing the name of the Charging Party from Insurance Agents' International Union, AFL-CIO, to Insurance Workers International Union, AFL-CIO, to reflect the alleged merger of the Charging Party with Insurance Workers of America, AFL-CIO, to form one combined and continued Union under the name of Insurance Workers International Union, AFL-CIO; and (2) to have the change of name of the Charging Party reflected in the Decision and Order and all further notices of the Board in this proceeding. Thereafter, the Respondent filed objections to the granting of the Motion without a full hearing as to whether the new Union is the same entity as the Charging Party, and averring that this proceeding is moot and should be dismissed

if the entity has changed. The matter having been duly considered by the Board,

IT IS HEREBY ORDERED that the record in the above-entitled proceeding be, and it hereby is, reopened and that a further hearing be held before a Trial Examiner for the purpose of adducing evidence as to the issues raised by the Motion to Change Name of Union and the alleged merger between Insurance Agents' International Union, AFL-CIO, and Insurance Workers of America, AFL-CIO, to form Insurance Workers International Union, AFL-CIO;¹ and

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for the Twenty-second Region for the purpose of arranging such further hearing, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof; and

IT IS FURTHER ORDERED that, upon conclusion of such hearing, the Trial Examiner shall prepare and cause to be served upon the parties a Supplemental Intermediate Report containing findings of fact upon the evidence received pursuant to the provisions of this Order, conclusions of law, and recommendations; and that following the service of such Supplemental Intermediate Report upon the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D. C. July 21, 1959.

By direction of the Board:

OGDEN W. FIELDS

Acting Executive Secretary

¹ See *National Carbon Company, a Division of Union Carbide and Carbon Corporation (Edgewater Works)*, 116 NLRB 488.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 5-RC-2678

THE UNION LIFE INSURANCE COMPANY, INC.

Employer

and

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO

Petitioner

**Order Granting Motion and Further Amending
Direction of Election**

On June 19, 1959, the Board issued its Decision and Direction of Election in the above-entitled matter, and on July 7, 1959, an amendment thereto. On June 23, 1959, the Petitioner filed a "Motion to Change Name of Petitioner." In this motion the Petitioner states that on May 27, 1959, pursuant to duly authorized negotiations, the approval of their respective General Executive Boards and Conventions, and ratification by Joint Convention, the Petitioner and the Insurance Workers of America, AFL-CIO, merged under the name of Insurance Workers International Union, AFL-CIO; that all rights and interests of the two AFL-CIO Internationals, including those in pending Board cases and collective bargaining contracts, were transferred to the Insurance Workers International Union, AFL-CIO. On the basis of these undisputed facts, the Petitioner in effect requests that the petition and other formal papers in the case be amended to substitute the name of Insurance Workers International Union, AFL-CIO, for the name of Petitioner and that Insurance Workers International Union, AFL-CIO, appear on the ballot in the election directed in this case.

On June 29, 1959, the Employer filed opposition to the Petitioner's motion in which it urged that the petition

herein should now be dismissed or, alternatively, that Insurance Workers International Union, AFL-CIO, be required to establish its compliance with the filing provisions of the Act and to submit a new showing of interest to support the petition. On June 30, 1959, the Petitioner filed a response thereto.

Regarding the Employer's motion to dismiss, the Board views the Petitioner's motion herein as one seeking merely to substitute the name of a successor labor organization in connection with a petition filed for an election to determine the bargaining representative of the Employer's employees. As the employees would have the opportunity in such an election, to accept or reject the successor labor organization, the Board denies the Employer's motion to dismiss the petition.¹

With respect to the Employer's contention that Insurance Workers International Union, AFL-CIO, be required to establish its compliance status, the fact of compliance is an administrative matter which may not be litigated in a representation proceeding. Moreover, the Board is administratively satisfied with the compliance status of Insurance Workers International Union, AFL-CIO.

As for the Employer's further contention that Insurance Workers International Union, AFL-CIO, be required to submit a new showing of interest, the Board has concluded that a new showing of interest should be submitted.

Under all the circumstances, the Board concludes that the Petitioner's motion to change the name of the Petitioner should be granted upon submission of a new showing of interest. Accordingly,

IT IS HEREBY ORDERED that the Petitioner's motion to substitute the name "Insurance Workers International Union, AFL-CIO" for the name "Insurance Agents' International

¹ *Atlantic Mills Servicing Corporation of Cleveland, Inc.*, 118 NLRB 1023. Also see *Mohawk Business Machines Corp.*, 118 NLRB 168.

Union, AFL-CIO" on the petition and other formal papers in the instant case, and on the ballot of the election heretofore directed herein, be, and it hereby is, granted, subject to submission of a new showing of interest; and

IT IS FURTHER ORDERED that the Direction of Election be, and it hereby is, further amended by striking therefrom the words "but not later than 45 days from the date below" and substituting therefor the words "but not later than 75 days from the date below."

Dated, Washington, D. C., July 27, 1959.

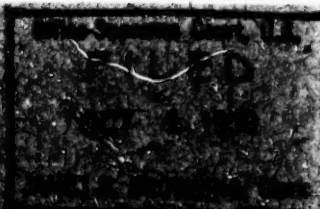
By direction of the Board:

OGDEN W. FIELDS

Associate Executive Secretary

MEMORANDUM FOR THE
NATIONAL LABOR BOARD IN
RESPONSE TO RESPONDENT'S
SUGGESTION OF ADOPTION

FILE COPY



No. 11

In the Superior Court of the State of New York

County of New York

Between the People of the State of New York, Plaintiff,

and the People of the State of New York, Defendant,

Comes the People of the State of New York, Plaintiff, by and through their

Attorneys, to move for an order of the Court directing the

People of the State of New York, Defendant,

to pay to the People of the State of New York, Plaintiff,

the sum of

One Hundred and Fifty Dollars (\$150.00)

In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 15

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN RESPONSE TO RESPONDENT'S SUGGESTION OF MOOTNESS

The Solicitor General, on behalf of the National Labor Relations Board, files this memorandum in response to respondent's suggestion that "the instant case may have been rendered abated or moot."

The Board's order in the instant case (R. 34-35) directs "the Respondent, Insurance Agents' International Union, AFL-CIO, its officers, representatives, agents, successors and assigns" to refrain from certain unfair labor practices "provided the Respondent remains the representative of the employees [of the Prudential Insurance Company] in the appropriate unit as prescribed in Section 9 of the Act."

(1)

During the pendency of the instant case in this Court, the respondent has merged with the Insurance Workers of America, AFL-CIO, under the name of Insurance Workers International Union, AFL-CIO. Following the merger, respondent filed a motion in two other proceedings pending before the Board in which respondent was a party, to substitute the name of the successor union for that of respondent. More particularly, in *The Prudential Insurance Company of America and Insurance Agents' International Union, AFL-CIO*, identified on the Board's records as Case No. 22-CA-194, respondent filed a motion (*infra*, App. A) requesting the Board "to amend the caption and any necessary formal files and papers in this matter, to record its change of name to Insurance Workers International Union, AFL-CIO, and to have the decision and order of the Board as well as any and all other further notices and proceedings herein appear with the name of and be applicable to the latter name and Union."

The basis of the motion was that it "is necessary to reflect the merger [between the two Unions] whereby these Unions continued and combined under the name of the Insurance Workers International Union, AFL-CIO." The Prudential Insurance Company objected to the granting of the motion without a hearing on it. The Board thereupon directed a hearing for the purpose of adducing evidence on the motion (Resp. Memo. App. A 1a).

Thereafter, on September 19, 1959, the Prudential withdrew its objections to the motion and has since entered into a collective bargaining agreement with the

successor union as the representative of its employees. Accordingly, the Board, on September 25, 1959, granted the motion (*infra*, App. B).

In the other proceeding, *The Union Life Insurance Company, Inc. and Insurance Agents' International Union, AFL-CIO*, a representation case, identified on the Board's records as Case No. 5-RC-2678, the respondent union made a similar motion as in the proceeding described above. Viewing the motion as one seeking merely to substitute the name of a successor labor organization in the election proceedings, the Board granted it but as a precautionary measure directed the successor union, as is normally required of a union seeking a representation election, to make a showing of interest, *i.e.*, that a minimum of 30 percent of the employees had designated it as their bargaining representative (Resp. Memo. App. B-3a).

Respondent, as it acknowledges, has consistently urged that the Insurance Workers International Union, AFL-CIO, is "its legal equivalent or successor for all purposes, including rights and obligations under the Labor Management Relations Act." The Prudential Insurance Co., by withdrawing its objection to respondent's motion in Case No. 22-CA-194, is no longer questioning this claim. Nor has the Board done anything inconsistent with respondent's claim.

The situation here is thus entirely distinguishable from *National Labor Relations Board v. Textile Workers Union*, certiorari granted, 350 U.S. 1004; order granting certiorari vacated and certiorari denied, 352 U.S. 864. There the Court vacated the writ

and denied certiorari after the Board had certified as the bargaining representative of the employees a union which had no connection whatsoever with the union against whom the Board's order was directed. In the instant case, respondent has not been supplanted by a different and unrelated union. It appears to be a constituent part of the successor union arising out of the merger and, no doubt, it will continue to have an important interest in, and control over, future collective bargaining negotiations on behalf of the employees of the Prudential Insurance Co.

The Board's order, which in terms is directed against respondent and its "*successors and assigns*" (R. 34), governs their future conduct in such negotiations. In these circumstances the vitality of the order is in no wise diminished. *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9; *Southport Petroleum Co. v. National Labor Relations Board*, 315 U.S. 100; *Walling v. Reuter*, 321 U.S. 671. The suggestion of mootness is therefore groundless. Moreover, in view of the merger the Board is filing herewith its motion to join the Insurance Workers International Union, AFL-CIO, as a party respondent.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,
National Labor Relations Board.

OCTOBER 1959.

APPENDIX A

In the United States of America
Before the National Labor Relations Board

Case No. 22-CA-194

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
and

INSURANCE AGENTS' INTERNATIONAL UNION, AFL-CIO

Motion to Change Name of Union

The Insurance Agents' International Union, AFL-CIO, the Charging Party and labor organization involved herein, moves the Board to amend the caption and any necessary formal files and papers in this matter, to record its change of name to Insurance Workers International Union, AFL-CIO, and to have the decision and Order of the Board as well as any and all other further notices and proceedings herein appear with the name of and be applicable to the latter name and Union.

The granting of this Motion is necessary to reflect the merger which has occurred between the Insurance Agents' International Union, AFL-CIO, and the Insurance Workers of America, AFL-CIO, whereby these Unions continued and combined under the name of the Insurance Workers International Union, AFL-CIO.

After duly authorized negotiations, a Merger Agreement was signed by duly authorized representatives of the Insurance Agents' International Union, AFL-CIO, and the Insurance Workers of America,

AFL-CIO, setting forth the procedures for the effectuation of their merger under the name of the Insurance Workers International Union, AFL-CIO, on February 20, 1959.

On the same date, the separate General Executive Boards of the two Unions approved a Merger Agreement and a proposed Constitution.

The proposed Constitution and the Merger Agreement were approved at Conventions of the two Unions, each meeting separately according to its own Constitution and also pursuant to the Merger Agreement on May 25, 1959.

On May 27, 1959, in Joint Convention, the Merger Agreement and the Constitution were ratified.

By this procedure the two Unions duly merged and transferred all their rights and interests, including those in pending Board cases and collective bargaining contracts and certifications, to the Insurance Workers International Union, AFL-CIO.

(S) Isaac N. Groner,
ISAAC N. GRONER,
Attorney for Union,
1701 K Street N.W., Washington 6, D.C.

APPENDIX B

In the United States of America
Before the National Labor Relations Board

Case No. 22-CA-194

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
and
INSURANCE AGENTS' INTERNATIONAL UNION,
AFL-CIO

ORDER GRANTING MOTION

On June 30, 1959, the Charging Party herein filed a Motion to Change Name of Union, seeking (1) to have the Board amend the caption and formal papers in this proceeding by changing the name of the Charging Party from Insurance Agents' International Union, AFL-CIO, to Insurance Workers International Union, AFL-CIO, in order to reflect the merger of the Charging Party with Insurance Workers of America, AFL-CIO, "whereby these Unions have formed one continued and combined Union under the name of Insurance Workers International Union, AFL-CIO;" and (2) to have the change of name reflected in the Decision and Order and all further notices of the Board in this proceeding. The Respondent filed objections to the granting of the Motion without a full hearing, and the Board, on July 21, 1959, issued an Order Reopening Record and Remanding Proceeding to Regional Director for Further Hearing on the Motion. Thereafter, by telegram dated September 18, 1959, the Respondent withdrew all objections to said Mo-

tion to Change Name of Union and consented to the entry of an order granting said Motion. Accordingly, the Board having duly considered the matter,

IT IS HEREBY ORDERED that the Order-Reopening Record and Remanding Proceeding to Regional Director for Further Hearing, dated July 21, 1959, be, and it hereby is, vacated; and

IT IS FURTHER ORDERED that the Motion to Change Name of Union, be, and it hereby is, granted.

Dated, Washington, D.C., September 25, 1959.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

FILE COPY

NOTION

ANICUS CURIAE

Office-Supreme Court, U.S.

FILED

OCT 9 1959

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 15

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INSURANCE AGENTS INTERNATIONAL UNION,
AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION OF AMICUS CURIAE

NAHUM A. BERNSTEIN,
SILVER, BERNSTEIN, SEAWELL & KAPLAN,
295 Madison Avenue,
New York 17, New York,
Counsel for

The Prudential Insurance Company of America.

DONALD R. SEAWELL,
of Counsel.

October 8, 1959

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. 15

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INSURANCE AGENTS INTERNATIONAL UNION, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION OF *AMICUS CURIAE*

The undersigned as Counsel for THE PRUDENTIAL INSURANCE COMPANY OF AMERICA (hereinafter "Company"), respectfully move this Court for leave to file the accompanying brief as *amicus curiae* in support of the petitioner's motion to add a party, and in reply to Respondent's suggestion of mootness.

From the very outset of the foregoing proceedings until the present date the Company has appeared and filed briefs in all proceedings. The Company was the charging party, and as an actual party to the proceedings before the Board, supplied almost all of the voluminous evidence which constitutes the record in this case. By a curious paradox created by statute the Company must move this

Court for leave to appear, although the Company could have been the Petitioner before this Court as a matter of right, if the National Labor Relations Board had not sustained the unfair labor practice charges filed by the Company.¹

The Petitioner has consented to the Company's filing of a brief as *amicus curiae* in support of Petitioner's Motion to Add a Party and in reply to Respondent's Suggestion of Mootness. However, the Respondent, after twice consenting to the Company's filing of *amicus* briefs before this Court on petition for a writ of certiorari and on the merits, now refuses to consent to the filing of the brief for which filing permission is sought by this motion.

The refusal of consent by Respondent is based upon the fact that the Company is in possession of a written contract signed by Respondent which, on its face, is clearly dispositive of the question of mootness and the Motion to Add a Party. The Respondent cannot deny the authenticity of this document if it is presented to the Court, and in the absence of such a denial, Respondent has no bona fide argument to support its Suggestion of Mootness or to oppose Petitioner's Motion to Add a Party.

The Appendix to the Company's proffered brief consists of the Merger Agreement entered into on February 20, 1959 between the Insurance Agents International Union and the Insurance Workers of America, which agreement created the party sought to be added by the Petitioner. This document was given to the Company by Respondent

1. Sec. 10(f) of the National Labor Relations Act provides that "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the Circuit wherein the Unfair Labor Practice in question was alleged to have been engaged in; or in the United States Court of Appeals for the District of Columbia * * *". As the Company won its case before the Board, it was not a "person aggrieved."

and was not available to the Petitioner herein for presentation to this Court at the time Petitioner made its motion. The Respondent has made it quite clear that it does not wish this document submitted to this Court for consideration.

This agreement provides in Paragraph "7" for the assumption by the merged Union of all of the debts, liabilities and obligations of the Respondent. Paragraph "9" provides that the merger:

"* * * shall not affect, interrupt, or change in any way, the continuing status, or the rights or duties with respect to third persons, of any organization affiliated with the LAIU of IWA * * *"

It further provides that the status of such organizations shall not be impaired "* * * in any pending action or proceeding * * *".

Paragraph "10" of the Merger Agreement specifically vests in the Insurance Workers International Union (the party sought to be added) all of the "* * * rights, privileges, duties and responsibilities * * *" heretofore undertaken by the Respondent herein through its collective bargaining agreements and certifications.

It is respectfully submitted that the Merger Agreement, in effect, is a written admission by the Respondent of its contractual obligation to consent to Petitioner's Motion to

Add a Party. It also invalidates Respondent's Suggestion of Mootness.

Respectfully submitted,—

SILVER, BERNSTEIN, SEAWELL & KAPLAN

by NAHUM A. BERNSTEIN, *Partner*
Attorneys For Amicus Curiae,
The Prudential Insurance Company
of America,

295 Madison Avenue,
New York 17, N. Y.

NAHUM A. BERNSTEIN,
DONALD R. SEAWELL,
of Counsel.

October 8, 1959

SUPREME COURT OF THE UNITED STATES

No. 15.—OCTOBER TERM, 1959.

National Labor Relations Board, Petitioner, v. Insurance Agents' International Union, AFL-CIO.	}	On Writ of Certiorari to the United States Court of Appeals for the District of Co- lumbia Circuit.
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[February 23, 1960.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents an important issue of the scope of the National Labor Relations Board's authority under § 8 (b) (3) of the National Labor Relations Act,¹ which provides that "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees" The precise question is whether the Board may find that a union, which confers with an employer with the desire of reaching agreement on contract terms, has nevertheless refused to bargain collectively, thus violating that provision, solely and simply because during the negotiations it seeks to put economic pressure on the employer to yield to its bargaining demands by sponsoring on-the-job conduct designed to interfere with the carrying on of the employer's business.

Since 1949 the respondent Insurance Agents' International Union and the Prudential Insurance Company of America have negotiated collective bargaining agreements covering district agents employed by Prudential in 35

¹ As added by the Labor Management Relations Act, 1947 (the Taft-Hartley Act), 61 Stat. 141, 29 U. S. C. § 158 (b) (3).

2 N. L. R. B. v. INSURANCE AGENTS UNION

States and the District of Columbia. The principal duties of a Prudential district agent are to collect premiums and to solicit new business in an assigned locality known in the trade as his "debit." He has no fixed or regular working hours except that he must report at his district office two mornings a week and remain for two or three hours to deposit his collections, prepare and submit reports, and attend meetings to receive sales and other instructions. He is paid commissions on collections made and on new policies written; his only fixed compensation is a weekly payment of \$4.50 intended primarily to cover his expenses.

In January 1956 Prudential and the union began the negotiation of a new contract to replace an agreement expiring in the following March. Bargaining was carried on continuously for six months before the terms of the new contract were agreed upon on July 17, 1956. It is not questioned that, if it stood alone, the record of negotiations would establish that the union conferred in good faith for the purpose and with the desire of reaching agreement with Prudential on a contract.

However, in April 1956, Prudential filed a § 8 (b) (3) charge of refusal to bargain collectively against the union. The charge was based upon actions of the union and its members outside the conference room, occurring after the old contract expired in March. The union had announced in February that if agreement on the terms of the new contract was not reached when the old contract expired, the union members would then participate in a "Work-Without-Contract" program—which meant that they would engage in certain planned, concerted on-the-job activities designed to harass the company.

A stenographic record of the discussions at the bargaining table was kept, and the transcription of it fills 72 volumes.

N. L. R. B. v. INSURANCE AGENTS UNION 3

A complaint of violation of § 8 (b) (3) issued on the charge and hearings began before the bargaining was concluded. It was developed in the evidence that the union's harassing tactics involved activities by the member agents such as these: refusal for a time to solicit new business, and refusal (after the writing of new business was resumed) to comply with the company's reporting procedures; refusal to participate in the company's "May Policyholders' Month Campaign"; reporting late at district offices the days the agents were scheduled to attend them, and refusing to perform customary duties at the offices; instead engaging there in "sit-in-mornings," "doing what comes naturally" and leaving at noon as a group; absenting themselves from special business conferences arranged by the company; picketing and distributing leaflets outside the various offices of the company on specified days and hours as directed by the union; distributing leaflets each day to policyholders and others and soliciting policyholders' signatures on petitions directed to the company; and presenting the signed policyholders' petitions to the company at its home office while simultaneously engaging in mass demonstrations there.

The hearing examiner filed a report recommending that the complaint be dismissed. The examiner noted that the Board in the so-called *Personal Products* case, *Textile Workers Union*, 108 N. L. R. B. 743, had declared similar union activities to constitute a prohibited refusal to bargain; but since the Board's order in that case was set aside by the Court of Appeals for the District of Columbia Circuit, 227 F. 2d 409, he did not consider that he was bound to follow it.

The hearings on the unfair labor practice charge were recessed in July to allow the parties to concentrate on the effort to negotiate the settlement which was arrived at in the new contract of July 17, 1936.

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However, the Board on review adhered to its ruling in the *Personal Products* case, rejected the trial examiner's recommendation, and entered a cease-and-desist order. 119 N. L. R. B. 568. The Court of Appeals for the District of Columbia Circuit also adhered to its decision in the *Personal Products* case, and, as in that case, set aside the Board's order. 260 F. 2d 736. We granted the Board's petition for certiorari to review the important question presented. 358 U. S. 944.

The hearing examiner found that there was nothing in the record, apart from the mentioned activities of the union during the negotiations, that could be relied upon to support an inference that the union had not fulfilled its statutory duty; in fact nothing else was relied upon by the Board's General Counsel in prosecuting the complaint. The hearing examiner's analysis of the congressional design in enacting the statutory duty to bargain led him to conclude that the Board was not authorized to find that such economically harassing activities constituted a § 8 (b) (3) violation. The Board's opinion answers flatly "We do not agree" and proceeds to say "the Respondent's reliance upon harassing tactics during the course of negotiations for the avowed purpose of compelling the Company to capitulate to its terms is the antithesis of reasoned discussion it was duty-bound to follow. Indeed, it clearly revealed an unwillingness to

Examining the matter *de novo* without the *Personal Products* decision of the Board as precedent, the examiner called repeatedly upon the Board's General Counsel for some evidence of failure to bargain in good faith, besides the harassing tactics themselves. When such evidence was not forthcoming, he commented, "It may well be that the Board will be able to 'objectively evaluate' the 'impact' of activities on 'collective bargaining negotiations' from the mere nature of the activities," but the Trial Examiner is reluctant even to attempt this feat of mental polevaulting with only presumption as a pole. 119 N. L. R. B. at 781-782.

submit its demands to the consideration of the bargaining table where argument, persuasion, and the free interchange of views could take place. In such circumstances, the fact that the Respondent continued to confer with the Company and was desirous of concluding an agreement does not *alone* establish that it fulfilled its obligation to bargain in good faith. . . . 119 N. L. R. B., at 769, 770-771. Thus the Board's view is that irrespective of the union's good faith in conferring with the employer at the bargaining table for the purpose and with the desire of reaching agreement on contract terms, its tactics during the course of the negotiations constituted *per se* a violation of § 8 (b) (3). Accordingly, as is said in the Board's brief, "The issue here . . . comes down to whether the Board is authorized under the Act to hold that such tactics, which the Act does not specifically forbid but Section 7 does not protect," support a finding of a failure to bargain in good faith as required by Section 8 (b) (3)."

First. The bill which became the Wagner Act included no provision specifically imposing a duty on either party to bargain collectively. Senator Wagner thought that the

The Board observed that the union's continued participation in negotiations and desire to reach an agreement only indicated that it "was prepared to go through the motions of bargaining while relying upon a campaign of harassing tactics to disrupt the Company's business, to achieve acceptance of its contractual demands." 119 N. L. R. B., at 771. The only apparent basis for the conclusion that the union was only going through the "motions" of bargaining is the Board's own postulate that the tactics in question were inconsistent with the Statutorily required norm of collective bargaining, and the Board's opinion, and its context, revealed that this was all that it meant. This *per se* rule amounted to the "pole-vaulting" that the Examiner said he was "reluctant even to attempt." See note 4, *supra*.

We will assume without deciding that the activities in question here were not "protected" under § 7 of the Act. See p. 16, and note 22, *infra*.

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bill required bargaining in good faith without such a provision. However, the Senate Committee in charge of the bill concluded that it was desirable to include a provision making it an unfair labor practice for an employer to refuse to bargain collectively in order to assure that the Act would achieve its primary objective of requiring an employer to recognize a union selected by his employees as their representative. It was believed that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement. It was said in the Senate Report:

"But, after deliberation, the committee has concluded that this fifth unfair labor practice should be inserted in the Bill. It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally-supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied

⁷ See Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., p. 43: "Therefore, while the bill does not state specifically the duty of an employer to recognize and bargain collectively with the representatives of his employees, because of the difficulty of setting forth this matter precisely in statutory language, such a duty is clearly implicit in the bill."

by fulfillment. Such a course provokes constant strife, not peace." S. Rep. No. 573, 74th Cong., 1st Sess., p. 12.

However, the nature of the duty to bargain in good faith thus imposed upon employers by § 8 (5) of the original Act⁴⁹ was not sweepingly conceived. The Chairman of the Senate Committee declared: "When the employees have chosen their organization, when they have selected their representatives, all the Bill proposes to do is to escort them to the door of the employer and say, 'Here they are, the legal representatives of your employees. What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.'"

The limitation implied by the last sentence has not been in practice maintained—practically, it could hardly have been—but the underlying purpose of the remark has remained the most basic purpose of the statutory provision. That purpose is the making effective of the duty of management to extend recognition to the union; the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union. Decisions under this provision reflect this. For example, an employer's unilateral wage increase during the bargaining processes tends to subvert the union's position as the representative of the employees in matters of this nature, and hence has been condemned as a practice violative of this statutory provision. See *Labor Board v. Crompton-Highland Mills, Inc.*, 337 U. S. 217. And as suggested, the requirement of collective bargaining, although so premised, necessarily led beyond the door of, and into the conference room. The first annual report of the

⁴⁹ Stat. 453. The corresponding provision in the current form of the Act is § 8(a)(5), 61 Stat. 141, 29 U. S. C. § 158(a)(5).

⁵⁰ Senator Walsh, at 79 Cong. Rec. 7660.

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Board declared: "Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground. . . . The Board has repeatedly asserted that good faith on the part of the employer is an essential ingredient of collective bargaining." " This standard had early judicial approval, *e. g.*, *Labor Board v. Griswold Mfg. Co.*, 106 F. 2d 713. Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract. See *Heinz Co. v. Labor Board*, 311 U. S. 514. This was the sort of recognition that Congress, in the Wagner Act, wanted extended to labor unions; recognition as the bargaining agent of the employees in a process that looked to the ordering of the parties' industrial relationship through the formation of a contract. See *Teamsters Union v. Oliver*, 358 U. S. 283, 295.

But at the same time, Congress was generally not concerned with the substantive terms on which the parties contracted. Cf. *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, 6. Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground. And in fact criticism of the Board's application of the "good-faith" test arose from the belief that it was forcing employers to yield to union demands if they were to avoid a successful charge of unfair labor

practice.¹¹ Thus, in 1947 in Congress the fear was expressed that the Board had "gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter proposals that he may or may not make." H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 19. Since the Board was not viewed by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the good-faith test of bargaining into § 8 (d) of the Taft-Hartley Act. That section defines collective bargaining as follows:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."¹²

The same problems as to whether positions taken at the bargaining table violate the good-faith test continue to arise under the Act as amended. See *Labor Board v. Truitt Mfg. Co.*, 351 U. S. 149; *Labor Board v. Borg-Warner Corp.*, 356 U. S. 342, 349. But it remains clear

¹¹ This Court related the history in *Labor Board v. American National Ins. Co.*, 343 U. S. 395, 404.

¹² 61 Stat. 142, 29 U. S. C. § 458 (d).

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that § 8 (d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements. *Labor Board v. American National Ins. Co.*, 343 U. S. 305, 404.

Second. At the same time as it was statutorily defining the duty to bargain collectively, Congress, by adding § 8 (b) (3) of the Act through the Taft-Hartley amendments, imposed that duty on labor organizations. Unions obviously are formed for the very purpose of bargaining collectively; but the legislative history makes it plain that Congress was wary of the position of some unions, and wanted to ensure that they would approach the bargaining table with the same attitude of willingness to reach an agreement as had been enjoined on management earlier. It intended to prevent employee representatives from putting forth the same "take it or leave it" attitude that had been condemned in management. 93 Cong. Rec. 4135, 4363, 5005.¹³

Third. It is apparent from the legislative history of the whole Act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace. See *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45. Discussion conducted under that standard of good faith may

¹³ Senator Ellender was most explicit on the matter at 93 Cong. Rec. 4135.

The legislative history seems also to have contemplated that the provision would be applicable to a union which declined to identify its bargaining demands while attempting financially to exhaust the employer. See the remark by Senator Hatch at 93 Cong. Rec. 5005. Cf. note 15, *infra*. A closely related application is developed in *American Newspaper Publishers Assn. v. Labor Board*, 193 F. 2d 782, 804-805, affirmed as to other issues on limited grant of certiorari, 345 U. S. 100.

narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take. The mainstream of cases before the Board and in the courts reviewing its orders, under the provisions fixing the duty to bargain collectively, is concerned with insuring that the parties approach the bargaining table with this attitude. But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences. See *Teamsters Union v. Oliver*, *supra*, at 205.

We believe that the Board's approach in this case—unless it can be defended, in terms of § 8 (b) (3), as resting on some unique character of the union tactics involved here—must be taken as proceeding from an erroneous view of collective bargaining. It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary, and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, fre-

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quently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. One writer recognizes this by describing economic force as "a prime motive power for agreements in free collective bargaining."¹⁴ Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess. A close student of our national labor relations laws writes: "Collective bargaining is curiously ambivalent even today. In one aspect collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics. As the relation matures, Lilliputian bonds control the opposing concentrations of economic power; they lack legal sanctions but are nonetheless effective to contain the use of power. Initially it may be only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle; but in time these forces generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion." Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1409.

For similar reasons, we think the Board's approach involves an intrusion into the substantive aspects of the

¹⁴ G. W. Taylor, *Government Regulation of Industrial Relations*, p. 18.

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bargaining process—again, unless there is some specific warrant for its condemnation of the precise tactics involved here. The scope of § 8 (b) (3) and the limitations on Board power which were the design of § 8 (d) are exceeded, we hold, by inferring a lack of good faith not from any deficiencies of the union's performance at the bargaining table by reason of its attempted use of economic pressure, but solely and simply because tactics designed to exert economic pressure were employed during the course of the good faith negotiations. Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations. See S. Rep. No. 105, 80th Cong., 1st Sess., p. 2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.

Fourth. The use of economic pressure, as we have indicated, is of itself not at all inconsistent with the duty of bargaining in good faith. But in three cases in recent years, the Board has assumed the power to label particular union economic weapons inconsistent with that duty. See the *Personal Products* case,¹⁵ *supra*, 108 N. L. R. B.

¹⁵ The facts in *Personal Products* did, in the Board's view, present the case of a union which was using economic pressure against an employer in a bargaining situation without identifying what its bar-

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743, set aside, 227 F. 2d 409; ¹⁶ the *Boone County* case, *United Mine Workers*, 117 N. L. R. B. 1095, set aside, 257 F. 2d 211; ¹⁷ and the present case. The Board freely (and we think correctly), conceded here that a "total" strike called by the union would not have subjected it to sanctions under § 8 (b) (3), at least if it were called after the old contract, with its no-strike clause, had expired. Cf. *United Mine Workers, supra*. The Board's opinion in the instant case is not so unequivocal as this concession (and therefore perhaps more logical).¹⁸ But in the light of it and the principles we have enunciated, we must evaluate the claim of the Board to power, under § 8 (b) (3), to distinguish among various economic pressure tactics and brand the ones at bar inconsistent with

gaining demands were—a matter which can be viewed quite differently in terms of an § 8 (b) (3) violation from the present case. See note 13, *supra*. The Board's decision in *Personal Products* may have turned on this to some extent, see 108 N. L. R. B., at 746; but its decision in the instant case seems to view *Personal Products* as turning on the same point as does the present case.

¹⁶ This Court granted certiorari, 350 U. S. 1004, on the Board's petition, to review that judgment; but in the light of intervening circumstances which at least indicated that the litigation had become less meaningful to the parties, cf. *The Monrosa v. Cuban Black Export, Inc.*, 359 U. S. 180, the order granting certiorari was vacated and certiorari was denied, 352 U. S. 864.

¹⁷ The court there displayed a want of sympathy to the Board's theory that a strike in breach of contract violated § 8 (b) (3), see 257 F. 2d, at 214-215. Cf. Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 Mich. L. Rev. 806-807. However, the court turned its decision on its ruling, *contra* the Board, that there was no breach of the contract involved. On this point, *contra* is *United Mine Workers v. Benedict Coal Corp.*, 259 F. 2d 346, 354, affirmed this day by an equally divided Court, *post*, p. —.

¹⁸ Said the Board: "Consequently, whether or not an inference of bad faith is permissible where a union engages in a protected strike to enforce its demands, there is nothing unreasonable in drawing such an inference where, as here, the union's conduct is not sanctioned by the Act." 119 N. L. R. B., at 771-772.

good-faith collective bargaining. We conclude its claim is without foundation.¹⁹

(a) The Board contends that the distinction between a total strike and the conduct at bar is that a total strike is a concerted activity protected against employer interference by §§ 7²⁰ and 8 (a)(1)²¹ of the Act while the activity at bar is not a protected concerted activity. We may agree *arguendo* with the Board²² that this Court's decision in the *Briggs-Stratton* case, *Automobile Workers v. Wisconsin Board*, 336 U. S. 245, establishes that the employee conduct here was not a protected concerted activity.²³ On this assumption the employer could have

¹⁹ Our holding on this ground makes it unnecessary for us to pass on the other grounds for affirmance of the Court of Appeals' judgment urged by respondent. These we take to include the argument that the Board's order violated the standards of § 8 (c) of the Act, 61 Stat. 142, 29 U. S. C. § 158 (c), and the points touched upon in notes 22 and 23, *infra*.

²⁰ "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" 49 Stat. 452, as amended, 61 Stat. 140, 29 U. S. C. § 157.

²¹ "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" 49 Stat. 452, as amended, 61 Stat. 140, 29 U. S. C. § 158 (a)(1).

²² Respondent cites a number of specific circumstances in the activities here that might distinguish them from the *Briggs-Stratton* case as to protection under § 7. We do not pass on the matter.

²³ *Briggs-Stratton* held, among other things, that employee conduct quite similar to the conduct at bar was neither protected by § 7 of the Act nor prohibited (made an unfair labor practice) by § 8. The respondent urges that the holding there that the conduct was not prohibited by § 8 in and of itself requires an affirmance of the judgment here, since in this case the Board's order found a violation of § 8. In fact the Board's General Counsel on oral argument made the con-

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discharged or taken other appropriate disciplinary action against the employees participating in these "slow-down," "sit-in," and arguably unprotected disloyal tactics. See *Labor Board v. Fansteel Metallurgical Corp.*, 306 U. S.

cession that *Briggs-Stratton* would have to be overruled for the Board to prevail here.

But regardless of the status today of the other substantive rulings in the *Briggs-Stratton* case, we cannot say that the case's holding as to § 8 requires a judgment for the respondent here. *Briggs-Stratton* was a direct review on certiorari here of a state board order, as modified and affirmed in the State Supreme Court, against the union conduct in question. The order was assailed by the union here primarily as being beyond the competence of the State to make, by reason of the federal labor relations statutes. This Court held that the activities in question were neither protected by § 7 nor prohibited by § 8, and allowed the state order to stand. The primary focus of attention was whether the activities were protected by § 7; there seems to have been no serious contention made that they were prohibited by § 8. The case arose long before the line of cases beginning with *Personal Products* in which the Board began to relate such activities to § 8 (b) (3). But of special significance is the fact that the approach to pre-emption taken in *Briggs-Stratton* was that the state courts and this Court on review were required to decide whether the activities were either protected by § 7 or prohibited by § 8. This approach is "no longer of general application," *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 245, n. 4, as this Court has since developed the doctrine in pre-emption cases that questions of interpretation of the National Labor Relations Act are generally committed in the first instance to the Board's administrative processes, *San Diego Building Trades Council v. Garmon*, *supra*, except in the atypical situation where those processes are not relevant to an answer to the question. See *Teamsters Union v. Oliver*, *supra*. Therefore to view *Briggs-Stratton* as controlling on the § 8 issue here would be to compound the defects of a now discarded approach to pre-emption; it would amount to saying that the Board would be foreclosed in its adjudicative development of interpretation of the Act by a decision rendered long ago, not arising in review of one of its own orders, at a time when its own views had not come to what they now are, and in which the precise issue (as to § 8 (b) (3)) was not litigated at all, and the general § 8 issue not litigated seriously. Hence we construe § 8 here uninfluenced by what was said in *Briggs-Stratton*.

However, we will not here re-examine what was said in *Briggs-Strat-*

240; *Labor Board v. Electrical Workers*, 346 U. S. 464. But surely that a union activity is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith. The reason why the ordinary economic strike is not evidence of a failure to bargain in good faith is not that it constitutes a protected activity but that, as we have developed, there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining. The Board suggests that since (on the assumption we make) the union members' activities here were unprotected, and they could have been discharged, the activities should also be deemed unfair labor practices, since thus the remedy of a cease-and-desist order, milder than mass discharges of personnel and less disruptive of commerce, would be available. The argument is not persuasive. There is little logic in assuming that because Con-

tonas to §§ 13 and 501. The union here contends that the definition of "strike" in § 501 (2) of the Taft-Hartley Act, 61 Stat. 161, 29 U. S. C. § 142 (2), which is broad enough to include the activities here in question, must be applied here under § 13 of the NLRA, which provides that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 49 Stat. 457, as amended, 61 Stat. 151, 29 U. S. C. § 163. And if it is so applied, the union argues that § 13 would prevent the Board from considering the conduct in question as an unfair labor practice. The issue was tendered in much the same light in *Briggs-Stratton*, and the Court quite plainly indicated that the definition in § 501 (2) was only to be considered in connection with § 8 (b) (4) and not with § 13, see 336 U. S., at 258-263, especially the last page; at the very least this was a holding alternative to a holding, 336 U. S., at 263-264, that however defined, § 13, unlike § 7, was not an inhibition on state power. Perhaps this element of the *Briggs-Stratton* decision has become open also, but certainly this is not so clear as is the fact that the § 8 point is open. In any event, we shall not consider the matter further since our affirmance of the Court of Appeals' reversal of the Board's order is, we believe, more properly bottomed on a construction of § 8 (b) (3).

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gress was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful as a matter of federal law. Our problem remains that of construing § 8 (b) (3)'s terms, and we do not see how the availability of self-help to the employer has anything to do with the matter.

(b) The Board contends that because an orthodox "total" strike is "traditional" its use must be taken as being consistent with § 8 (b) (3); but since the tactics here are not "traditional" or "normal," they need not be so viewed.²⁴ Further, the Board cites what it conceives to be the public's moral condemnation of the sort of employee tactics involved here. But again we cannot see how these distinctions can be made under a statute which simply enjoins a duty to bargain in good faith. Again, these are relevant arguments when the question is the scope of the concerted activities given affirmative protection by the Act. But as we have developed, the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining. On this basis, we fail to see the relevance of whether the practice in question is time-honored or whether its exercise is generally supported by public opinion. It may be that the tactics used here deserve condemnation, but this would not justify attempting to pour that condemnation into a vessel not designed to hold it.²⁵ The same may be said

²⁴ The Board quotes, in support of this, general language from a decision of this Court, *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U. S. 342, 346, dealing with a wholly different matter—the scope of subjects appropriate for collective bargaining.

²⁵ "To say 'there ought to be a law against it' does not demonstrate the propriety of the NLRB's imposing the prohibition." Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1437.

for the Board's contention that these activities, as opposed to a "normal" strike, are inconsistent with § 8 (b) (3) because they offer maximum pressure on the employer at minimum economic cost to the union. One may doubt whether this was so here,²⁶ but the matter does not turn on that. Surely it cannot be said that the only economic weapons consistent with good-faith bargaining are those which minimize the pressure on the other party or maximize the disadvantage to the party using them. The catalog of union and employer²⁷ weapons that might thus fall under ban would be most extensive.²⁸

²⁶ Though it is much urged in the Board's brief here as a general proposition, the Board's opinion (following its *per se* approach) contains no discussion of this point at all insofar as the facts of the case were concerned; it did not discuss the economic effect of the activities on the agents themselves and expressly declined to pass on their effect on the employer. 119 N. L. R. B., at 771. Respondent here urges that the evidence establishes quite the opposite conclusion.

²⁷ "If relative power be the proper test, surely one who believed the unions to be weak would come to the opposite conclusion. Is it an abuse of bargaining powers to threaten a strike at a department store two weeks before Easter instead of engaging in further discussion, postponing the strike until after Easter when the employer will feel it less severely? Is it unfair for an employer to stall negotiations through a busy season or while he is building up inventory so that he can stand a strike better than the workers?" Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1440-1441.

²⁸ There is a suggestion in the Board's opinion that it regarded the union tactics as a unilateral setting of the terms and conditions of employment and hence also on this basis violative of § 8 (b) (3), just as an employer's unilateral setting of employment terms during collective bargaining may amount to a breach of its duty to bargain collectively. *Labor Board v. Crompton-Highland Mills, Inc.*, 337 U. S. 217. See 119 N. L. R. B., at 772. Prudential, as *amicus curiae* here, renews this point though the Board does not make it here. It seems baseless to us. There was no indication that the practices that the union was engaging in were designed to be permanent conditions

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Fifth. These distinctions essayed by the Board here, and the lack of relationship to the statutory standard inherent in them, confirm us in our conclusion that the judgment of the Court of Appeals, setting aside the order of the Board, must be affirmed. For they make clear to us that when the Board moves in this area, with only § 8 (b) (3) for support, it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. It has sought to introduce some standard of properly "balanced" ²⁹ bargaining power, or some new distinction of justifiable and unjustifiable, proper and "abusive" ³⁰ economic weapons into the collective bargaining duty imposed by the Act. The Board's assertion of power under § 8 (b) (3) allows it to sit in judgment upon every economic weapon the parties to a labor contract negotiation employ, judging it on the very general standard of that section, not drafted with reference to specific forms of economic pressure. We have expressed our belief that this amounts to the Board's entrance into the substantive

of work. They were rather means to another end. The question whether union conduct could be treated, analogously to employer conduct, as unilaterally establishing working conditions, in a manner violative of the duty to bargain collectively, might be raised for example by the case of a union, anxious to secure a reduction of the working day from eight to seven hours, which instructed its members, during the negotiation process, to quit work an hour early daily. Cf. Note, 71 Harv. L. Rev. 502, 509. But this situation is not presented here, and we leave the question open.

²⁹ The Board's opinion interprets the National Labor Relations Act to require, in this particular, "a background of balanced bargaining relations." 119 N. L. R. B., at 772.

³⁰ The Board in *Personal Products* condemned the union's tactics as an "abuse of the Union's bargaining powers." 108 N. L. R. B., at 746.

aspects of the bargaining process to an extent Congress has not countenanced.

It is one thing to say that the Board has been afforded flexibility to determine, for example, whether an employer's disciplinary action taken against specific workers is permissible or not, or whether a party's conduct at the bargaining table evidences a real desire to come into agreement. The statute in such areas clearly poses the problem to the Board for its solution. Cf. *Labor Board v. Truck Drivers' Union*, 353 U. S. 87. And, specifically we do not mean to question in any way the Board's powers to determine the latter question, drawing inferences from the conduct of the parties as a whole. It is quite another matter, however, to say that the Board has been afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful. Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions. See § 8 (b) (4) of the National Labor Relations Act, as added by the Taft-Hartley Act, 61 Stat. 141, and as supplemented by the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 542; (29 U. S. C. § 158 (b) (4)); § 8 (b) (7), as added by the latter Act, 73 Stat. 544. But the activities here involved have never been specifically outlawed by Congress.³¹ To be sure, the express prohibitions of the Act are not exclusive—if there were any questions of a stratagem or device to evade the policies of the Act, the Board hardly would be powerless. *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 194. But it is clear to us that the Board needs

³¹ It might be noted that the House bill, when the Taft-Hartley Act was in the legislative process, contained a list of "unlawful concerted activities" one of which would quite likely have reached some of the union conduct here, but the provision never became law. H. R. 3020, 80th Cong., 1st Sess., § 12.

a more specific charter than § 8 (b) (3) before it can add to the Act's prohibitions here.

We recognize without hesitation the primary function and responsibility of the Board to resolve the conflicting interests that Congress has recognized in its labor legislation. Clearly, where the "ultimate problem is the balancing of the conflicting legitimate interests" it must be remembered that "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Labor Board v. Truck Drivers Union*, *supra* at 96. Certainly a "statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application." *Phelps Dodge Corp. v. Labor Board*, *supra*, at 194. But recognition of the appropriate sphere of the administrative power here obviously cannot exclude all judicial review of the Board's actions. On the facts of this case we need not attempt a detailed delineation of the respective functions of court and agency in this area. We think the Board's resolution of the issues here amounted not to a resolution of interests which the Act had left to it for case-by-case adjudication, but a movement into a new area of regulation which Congress had not committed to it. Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked. We see no indication here that Congress has put it to the Board to define through its processes what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.

It is suggested here that the time has come for a re-evaluation of the basic content of collective bargaining

as contemplated by the federal legislation. But that is for Congress. Congress has demonstrated its capacity to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country. Major revisions of the basic statute were enacted in 1947 and 1959. To be sure, then, Congress might be of opinion that greater stress should be put on the role of "pure" negotiation in settling labor disputes to the extent of eliminating more and more economic weapons from the parties' grasp, and perhaps it might start with the ones involved here; or in consideration of the alternatives, it might shrink from such an undertaking. But Congress' policy has not yet moved to this point, and with only § 8(b)(3) to lean on, we do not see how the Board can do so on its own.

Affirmed.

After we granted certiorari we postponed to the consideration of the case on the merits a motion by the Board to join as a party here Insurance Workers International Union, AFI-CIO, the state of a new union formed by merger of respondent and another union after the decision of this case in the Court of Appeals, and a contingent motion by respondent that it be deleted as a party. 361 U. S. 872. In the light of our ruling on the merits, there is little point in determining here and now what the legal status of the predecessor and successor union is, and if the issue ever becomes important, we think that the matter is best decided then. For what it is worth we shall treat both as parties before us in this proceeding. The Board's motion is granted and respondent's is denied. See *Labor Board v. Lone Oil Co.*, 352 U. S. 282.

SUPREME COURT OF THE UNITED STATES

No. 15.—OCTOBER TERM, 1959.

National Labor Relations Board, Petitioner, v. Insurance Agents' International Union, AFL-CIO.	On Writ of Certiorari to the United States Court of Appeals for the District of Co- lumbia Circuit.
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[February 23, 1960.]

Separate opinion of MR. JUSTICE FRANKFURTER, which MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join.

The sweep of the Court's opinion, with its far-reaching implications in a domain of lawmaking of such nationwide importance as that of legal control of collective bargaining, compels a separate statement of my views.

The conduct which underlies this action was the respondent union's "Work Without a Contract" program, which it admittedly initiated after the expiration of its contract with the Prudential Insurance Company on March 19, 1956. In brief, the union directed its members at various times to arrive late to work; to decline, by "sitting-in" the company offices, to work according to their regular schedule; to refuse to write new business or, when writing it, not to report it in the ordinary fashion; to decline to attend special business meetings; to demonstrate before company offices; and to solicit petitions in the union's behalf from policyholders with whom they dealt. Prudential was given notice in advance of the details of this program and of the demands which the union sought to achieve by carrying it out.

This action was commenced by a complaint issued on June 5, 1956, alleging respondent's failure to bargain in good faith. After a hearing, the Trial Examiner recommended that the complaint be dismissed, finding that "[f]rom the 'circumstantial evidence' [of the union's state of mind] of the bargaining itself . . . but one inference

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is possible . . . the Union's motive was one of good faith . . . and that "whatever inference may as reasonably be drawn from the Union's concurrent 'unprotected' activities" is not sufficient to outweigh this evidence of good faith.

The Board sustained exceptions to the Trial Examiner's report, concluding that respondent failed to bargain in good faith. The only facts relied on by the Board were based on the "Work Without a Contract" program. The Board found that such tactics on respondent's part "clearly revealed an unwillingness to submit its demands to the consideration of the bargaining table" and that respondent therefore failed to bargain in good faith. In support of its conclusion of want of bargaining in good faith, the Board stated that "[h]arassing activities are plainly irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good faith must rest" The Board made no finding that the outward course of the negotiations gave rise to an inference that respondent's state of mind was one of unwillingness to reach agreement. It found from the character of respondent's activities in carrying out the "Work Without a Contract" program that what appeared to be good faith bargaining at the bargaining table was in fact a sham:

"[T]he fact that Respondent continued to confer with the Company and was desirous of concluding an agreement does not *alone* establish that it fulfilled its obligation to bargain in good faith, as the Respondent argues and the Trial Examiner believes. At most it demonstrates that the Respondent was prepared to go through the motions of bargaining while relying upon a campaign of harassing tactics to disrupt the Company's business to achieve acceptance of its contractual demands."

The Board issued a cease-and-desist order and sought its enforcement in the Court of Appeals for the District of Columbia. Respondent cross-petitioned to set it aside. The Court of Appeals, relying exclusively on its prior decision in *Textile Workers Union v. Labor Board*, 227 F. 2d 409 (1935) denied enforcement and set aside the order. In the *Textile Workers* case the court had held (one judge dissenting) that the Board could not consider the "harassing" activities of the union there involved as evidence of lack of good faith during the negotiations. "There is not the slightest inconsistency between genuine desire to come to an agreement and use of economic pressure to get the kind of agreement one wants." 227 F. 2d 409, 410.

The record presents two different grounds for the Board's action in this case. The Board's own opinion proceeds in terms of an examination of respondent's conduct as it bears upon the genuineness of its bargaining in the negotiation proceedings. From the respondent's conduct the Board drew the inference that respondent's state of mind was inimical to reaching an agreement, and that inference alone supported its conclusion of a refusal to bargain. The Board's position in this Court proceeded in terms of the relation of conduct such as respondent's to the kind of bargaining required by the statute without

The order in part provided: "[T]he Respondent shall:
1. Cease and desist from refusing to bargain collectively in good faith with the Prudential Insurance Company of America by authorizing, directing, supporting, inducing or encouraging the Company's employees to engage in slowdowns, harassing activities or other unprotected conduct, in the course of their employment and in disregard of their duties and customary routines, for the purpose of forcing the Company to accept its bargaining demands; or from engaging in any like or related conduct in derogation of its statutory duty to bargain."

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regard to the bearing of such conduct on the proof of good faith revealed by the actual bargaining. The Board maintained that it

"could appropriately determine that the basic statutory purpose of promoting industrial peace through the collective bargaining process would be defeated by sanctioning resort to this form of industrial warfare as a collective bargaining technique."

The opinion of this Court, like that of the Court of Appeals, disposes of both questions by a single broad stroke. It concludes that conduct designed to exert pressure on the bargaining situation with the aim of achieving favorable results is to be deemed entirely consistent with the duty to bargain in good faith. No evidentiary significance, not even an inference of a lack of good faith, is allowed to be drawn from the conduct in question as part of a total context.

I agree that the position taken by the Board here is not tenable. In enforcing the duty to bargain the Board must find the ultimate fact whether, in the case before it and in the context of all its circumstances, the respondent has engaged in bargaining without the sincere desire to reach agreement which the Act commands. I further agree that the Board's action in this case is not sustainable as resting upon a determination that respondent's apparent bargaining was in fact a sham, because the evidence is insufficient to justify that conclusion even giving the Board, as we must, every benefit of its right to draw on its experience in interpreting the industrial significance of the facts of a record. "See *Universal Camera Corp. v. Labor Board*, 340 U. S. 474. What the Board has in fact done is lay down a rule of law that such conduct as was involved in carrying out the "Work Without a Contract" program, necessarily betokens bad faith in the negotiations.

The Court's opinion rests its conclusion on the generalization that "the ordinary economic strike is not evidence of a failure to bargain in good faith . . . because . . . there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining." This large statement is justified solely by reference to § 8 (b) (3) and to the proposition that inherent in bargaining is room for the play of forces which reveal the strength of one party, or the weakness of the other, in the economic context in which they seek agreement. But in determining the state of mind of a party to collective bargaining negotiations the Board does not deal in terms of abstract "economic pressure." It must proceed in terms of specific conduct which it weighs as a more or less reliable manifestation of the state of mind with which bargaining is conducted. No conduct in the complex context of bargaining for a labor agreement can profitably be reduced to such an abstraction as "economic pressure." An exertion of "economic pressure" may at the same time be part of a concerted effort to evade or disrupt a normal course of negotiations. Vital differences in conduct, varying in character and effect from mild persuasion to destructive, albeit "economic," violence, are obscured under cover of a single abstract phrase.

While § 8 (b) (3) of course contemplates some play of "economic pressure," it does not follow that the purpose in engaging in tactics designed to exert it is to reach agreement through the bargaining process in the manner which the statute commands, so that the Board is precluded from considering such conduct, in the totality of circumstances, as evidence of the actual state of mind of the actor. Surely to deny this scope for allowable judg-

² There are plenty of methods of coercion short of actual physical violence. Senator Taft, at 93 Cong. Rec. 4021.

ment to the Board is to deny it the special function with which it has been entrusted. See *Universal Camera Corp. v. Labor Board*, *supra*. This Court has in the past declined to pre-empt by broad proscriptions the Board's competence in the first instance to weigh the significance of the raw facts of conduct and draw from them an informed judgment as to the ultimate fact. It has recognized that the significance of conduct, itself apparently innocent and evidently insufficient to sustain a finding of an unfair labor practice, "may be altered by imponderable subtleties at work, which it is not our function to appraise" but which are, first, for the Board's consideration upon all the evidence. *Labor Board v. Virginia Lower Co.*, 314 U. S. 469, 479. Activities in isolation may be wholly innocent, lawful and "protected" by the Act, but that ought not to bar the Board from finding, if the record justifies it, that the isolated parts "are bound together as the parts of a single plan [to frustrate agreement]. The plan may make the parts unlawful." *Swift & Co. v. United States*, 196 U. S. 375, 396. See also *Aikens v. Wisconsin*, 195 U. S. 194, 206.

Moreover, conduct designed to exert and exerting "economic pressure" may not have the shelter of § 8 (b) (3) even in isolation. Unlawful violence, whether to person or livelihood, to secure acceptance of an offer, is as much a withdrawal of included statutory subjects from bargaining as the "take it or leave it" attitude which the statute clearly condemns. One need not romanticize the community of interest between employers and employees, or be unmindful of the conflict between them, to recognize that utilization of what in one set of circumstances may only signify resort to the traditional weapons of labor may in another and relevant context offend the

¹ As the Court states, the prevention of union conduct designed to enforce such an attitude was a primary purpose of the enactment of § 8 (b) (3). See, e. g., 93 Cong. Rec. 4135.

attitude toward bargaining commanded by the statute. Section 8 (b) (3) is not a specific direction, but an expression of a governing viewpoint or policy to which, by the process of specific application, the Board and the courts must give concrete, not doctrinaire content.

The main purpose of the Wagner Act was to put the force of law behind the promotion of unionism as the legitimate and necessary instrument "to give laborers opportunity to deal on equality with their employer." Mr. Chief Justice Taft for the Court, in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209. Equality of bargaining power between capital and labor, to use the conventional terminology of our predominant economic system, was the aim of this legislation. The presupposition of collective bargaining was the progressive enlargement of the area of reason in the process of bargaining through the give-and-take of discussion and enforcing machinery within industry, in order to substitute, in the language of Mr. Justice Brandeis, "processes of justice for the more primitive method of trial by combat." *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 488 (dissenting). Promotion of unionism by the Wagner Act, with the resulting progress of rational collective bargaining has been gathering momentum for a quarter of a century. In view of the economic and political strength which has thereby come to unions, interpretations of the Act ought not to proceed on the assumption that it actively throws its weight on the side of unionism in order to redress an assumed inequality of bargaining power. For the Court to fashion the rules governing collective bargaining on the assumption that the power and position of labor unions and their solidarity are what they were twenty-five years ago, is to fashion law on the basis of unreality. Accretion of power may carry with it increasing responsibility for the manner of its exercise.

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Therefore, in the unfolding of law in this field it should not be the inexorable premise that the process of collective bargaining is by its nature a bellicose process. The broadly phrased terms of the Taft-Hartley Act should be applied to carry out the broadly conceived policies of the Act. At the core of the promotion of collective bargaining, which was the chief means by which the great social purposes of the National Labor Relations Act were sought to be furthered, is a purpose to discourage, more and more, industrial combatants from pressing their demands by all available means to the limits of the justification of self-interest. This calls for appropriate judicial construction of existing legislation. The statute lays its emphasis upon reason and a willingness to employ it as the dominant force in bargaining. That emphasis is respected by declining to take as a postulate of the duty to bargain that the legally impermissible exertions of so-called economic pressure must be restricted to the crudities of brute force. Cf. *Labor Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240.

However, it of course does not follow because the Board may find in tactics short of violence evidence that a party means not to bargain in good faith that every such finding must be sustained. Section 8 (b) (3) itself as previously construed by the Board and this Court and as amplified by § 8 (d), provides a substantial limitation on the Board's becoming, as the Court fears, merely "the arbiter of the sort of economic weapons the parties can use to gain acceptance of their bargaining demands." The Board's function in the enforcement of the duty to bargain does not end when it has properly drawn an inference unfavorable to the respondent from particular conduct. It must weigh that inference as part of the totality of inferences which may appropriately be drawn from the entire conduct of the respondent, particularly its conduct at the bargaining table. The state of mind with

which the party charged with a refusal to bargain entered into and participated in the bargaining process is the ultimate issue upon which alone the Board must act in each case, and on the sufficiency of the whole record to justify its decision the courts must pass. *Labor Board v. American National Ins. Co.*, 343 U. S. 395.

The Board urges that this Court has approved its enforcement of § 8 (b) (3) by the outlawry of conduct *per se*, and without regard to ascertainment of a state of mind. It relies upon four cases: *H. J. Heinz Co. v. Labor Board*, 311 U. S. 514; *Labor Board v. Crompton-Highland Mills*, 337 U. S. 217; *Labor Board v. F. W. Woolworth Co.*, 352 U. S. 938; and *Labor Board v. Borg-Warner Corp.*, 356 U. S. 342. These cases do not sustain its position. While it is plain that the *per se* proscription of an employer's refusal to reduce a collective agreement to writing was approved in the *Heinz* case, it is equally plain from its opinion in that case as well as its argument before this Court that the Board itself regarded the act of refusal to agree to the integration of the agreement in a writing as a manifestation that the employer's state of mind was hostile to agreement with the union. This Court so regarded the evidence. 311 U. S., at 525-526. Decision in the *Borg-Warner* case proceeded from a similar premise. By forcing a deadlock upon a non-statutory subject of bargaining the employer manifested his intention to withdraw the statutory subjects from bargaining. The *Crompton-Highlands* decision rested not on approval of a *per se* rule that unilateral changes of the conditions of employment by an employer during bargaining is a refusal to bargain, but upon the inferences of a lack of good faith which arose from the facts, among others, that the employer instituted a greater increase than it had offered the union and that it did so without consulting the union. Finally, no such conclusion as the Board urges can be drawn from the summary disposition of the *Woolworth*:

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case here.¹ To the extent that in any of these cases language referred to a *per se* proscription of conduct it was in relation to facts strongly indicating a lack of a sincere desire to reach agreement.

Moreover, in undertaking to fashion the law of collective bargaining in this case in accordance with the command of § 8 (b) (3), the Board has considered § 8 (b) (3) in isolation, as if it were an independent provision of law, and not a part of a reticulated legislative scheme with interlacing purposes. It is the purposes to be drawn from the statute in its entirety, with due regard to all its inter-related provisions, in relation to which § 8 (b) (3) is to be applied. Cf. *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 456. A pertinent restraint on the Board's power to consider as inimical to fair bargaining the exercise of the "economic" weapons of labor is expressed in the Act by § 13:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

¹The Court held that "The Board acted within its allowable discretion in finding that under the circumstances of this case failure to furnish the wage information constituted an unfair labor practice." It cited *Labor Board v. Truitt Mfg. Co.*, 351 U. S. 149, and in *Truitt* the entire Court was in agreement both that the withholding of wage information by the employer was weighty evidence of a lack of willingness to bargain sincerely, and that the judgment of the Board had to be predicated on all the facts pertinent to state of mind. 351 U. S. at 153, 155. Moreover, the lower court in the *Woolworth* case found that the Board had not proceeded by a *per se* determination, 235 F. 2d 319, 322 (C. A. 9th Cir.), but that there was no basis for its conclusion that the information requested was relevant to administration of the agreement.

While the Board does consider these sections in connection with respondent's assertion that they afford protection to its conduct from Board regulation, see n. 8, *infra*, it does not consider their application as a rule of construction of § 8 (b) (3).

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Section 501 (2) of the Labor Management Relations Act provides a definition of "strike":

"When used in this Act— (2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any other concerted slowdown or other concerted interruption of operations by employees."

As the last clause of § 13 makes plain, the section does not recognize an unqualified right, free of Board interference, to engage in "strikes," as respondent contends. The Senate Report dealing with the addition of the clause to the section confirms that its purpose was to approve the elaboration of limitations on the right to engage in activities nominally within the definition of § 501 (2) which this Court had heretofore developed in

"Although I am in sympathy with the Court's conclusion that the construction of § 8 in this case is to be uninfluenced by what was said in *Automobile Workers v. Wisconsin Board*, 336 U. S. 245, I do not agree that that case held that the definitions of § 501 (2) are inapplicable to § 13. The question which the Court there considered was whether § 13, as defined in § 501 (2), independently rendered activities within its terms immune from state regulation. The Court's observation that for § 501 (2) to have so extended the force of § 13 would have been inconsistent with the purpose of the inclusion of the definition, which was to extend the Board's power with reference to the unfair labor practices defined by § 8 (b) (4), 336 U. S. at 253, was made in light of the contention that § 13 itself had the effect of precluding the States. The crux of the decision with regard to § 13 was that it announced no more than a rule of construction of the Federal Act. It was neither argued nor decided that § 501 (2) does not apply to § 13. There appears to be no support for such a conclusion either in the text of the Act or in its legislative history. It is hardly conceivable that such a word as "strike" could have been defined in these statutes without congressional realization of the obvious scope of its application.

U. S. Rep. No. 105, 80th Cong., 1st Sess. (1947), at p. 28. This provision of the Taft bill was adopted by the Conference. H. R. Conf. Rep. No. 540, 80th Cong., 1st Sess. (1947), at p. 50.

such cases as *Fansteel Metallurgical Corp. v. Labor Board*, *supra*; *Labor Board v. Sands Mfg. Co.*, 306 U. S. 332; and *Southern S. S. Co. v. Labor Board*, 316 U. S. 31. But "limitations and qualifications" do not extinguish the rule. For the Board to proceed, as it apparently claims power to do, against conduct which, but for the bargaining context in which it occurs, would not be within those "limitations," it must rely upon the specific grant of power to enforce the duty to bargain which is contained in § 8(b)(3). In construing that section the policy of the rule of construction set forth by § 13, see *Automobile Workers v. Wisconsin Board*, 336 U. S. 245, 259, must be taken into account. In the light of that policy there is no justification for divorcing from the total bargaining situation particular tactics which the Board finds undesirable, without regard to the actual conduct of bargaining in the case before it.

The scope of the permission embodied in § 13 must be considered by the Board in determining, under a proper rule of law, whether the totality of the respondent's conduct justifies the conclusion that it has violated the "specific" command of § 8(b)(3). When the Board emphasizes tactics outside the negotiations themselves as the basis of the conclusion that the color of illegitimacy is imparted to otherwise apparently bona fide negotia-

* The Board urges that respondent's activities are not within the "dispensation or protection" of § 13, because *Automobile Workers v. Wisconsin Board*, 336 U. S. 245, held "slowdowns" to be "unprotected" activities subject to state regulation. The argument understates the significance of that case as regards § 13. See n. 6, *supra*. Nor is it valid to assume that all conduct loosely described as a "slowdown" has the same legal significance, or that union sponsorship of such conduct falls within the "limitations or qualifications" on the right to strike incorporated in § 13 in every case in which employer participation in it would be "unprotected" by § 7, and therefore subject to economic retaliation by the employer. See the portions of the Board's order quoted in n. 1, *supra*.

tions, § 13 becomes relevant. A total, peaceful strike in compliance with the requirements of § 8 (d) would plainly not suffice to sustain the conclusion; prolonged union-sponsored violence directed at the company to secure compliance as plainly would. Here, as in so many legal situations of different gradations, drawing the line between them is not an abstract, speculative enterprise. Where the line ought to be drawn should await the decision of particular cases by the Board. It involves experienced judgment regarding the justification of the means and the severity of the effect of particular conduct in the specialized context of bargaining.

Section 8 (d), which was added in the amendments of 1947, is also inconsistent with the Board's claim of power to proscribe conduct without regard to the state of mind with which the actor participated in negotiations. The 1935 Act did not define the "practice and procedure of collective bargaining" which it purposed to "encourage." Act of July 5, 1935, § 1, 49 Stat. 449. That definition, until 1947, was evolved by the Board and the courts in the light of experience in the administration of the Act. See, e. g., *H. J. Heinz Co. v. Labor Board*, *supra*. In 1947, after considerable controversy over the need to objectify the elements of the duty to bargain, § 8 (d) was enacted. We have held that the history of that enactment demonstrates an intention to restrain the Board's power to regulate, whether directly or indirectly, the substantive terms of collective agreements. *Labor Board v. American National Ins. Co.*, *supra*, at 404. In the same case we recognized that implicit in that purpose is a restraint upon the Board's proceeding by the proscription of conduct *per se* and without regard to inferences as to state of mind to be drawn from the totality of the conduct in each case. *Id.*, at 409.

Finally, it is not disputed that the duty to bargain imposed on unions in 1947 was the same as that pre-

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viously imposed on employers, and it is therefore not without significance for its present assertion of power that for 25 years of administration of the employer's duty to bargain, which was imposed by the Act of 1935 and preserved by the amendments of 1947, the Board has not found it necessary to assert that it may proscribe conduct as undesirable in bargaining without regard to the actual course of the negotiations. See *Federal Trade Comm'n v. Bunte Bros.*, 312 U. S. 349, 351-352.

These considerations govern the disposition of the case before the Court. Viewed as a determination upon all the evidence that the respondent bargained without the sincere desire to compose differences and reach agreement which the statute commands, the Board's conclusion must fall for want of support in the evidence as a whole. See *Universal Camera Corp. v. Labor Board*, *supra*. Apart from any restraint upon its conclusion imposed by § 13, a matter which the Board did not consider, no reason is manifest why the respondent's nuisance tactics here should be thought a sufficient basis for the conclusion that all its bargaining was in reality a sham. On this record it does not appear that respondent merely stalled at the bargaining table until its conduct outside the negotiations might force Prudential to capitulate to its demands, nor does any other evidence give the color of pretence to its negotiating procedure. From the conduct of its counsel before the Trial Examiner, and from its opinion, it is apparent that the Board proceeded upon the belief that respondent's tactics were, without more, sufficient evidence of a lack of a sincere desire to reach agreement to make other consideration of its conduct unnecessary. For that reason the case should be remanded to the Board for further opportunity to introduce pertinent evidence, if any there be, of respondent's lack of good faith.

Viewed as a determination by the Board that it could quite apart from respondent's state of mind, proscribe its tactics because they were not "traditional" or were thought to be subject to public disapproval, or because employees who engaged in them may have been subject to discharge, the Board's conclusion proceeds from the application of an erroneous rule of law.

The decision of the Court of Appeals should be vacated and the case remanded to the Board for further proceedings consistent with these views.